Supreme Court, U.S.
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No. 95-___

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

CARRIE JAFFEE, as Special Administrator
for Ricky Allen, Sr.

Petitioners,

v.

MARYLU REDMOND Hoffman Estates Police Officer
and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict between the circuits about the existence of a psychotherapist privilege under Rule 501 of the Federal Rules of Evidence?

2. Assuming that a psychotherapist privilege is recognized under Rule 501, should this privilege extend beyond psychiatrists and clinical psychologists, as contemplated in Proposed Rule of Evidence 504, and instead apply to any "mental health care provider?"

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**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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Petitioner Carrie Jaffee, as Special Administrator for the Estate of Rickie Allen, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 6, 1995.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-24) is reported at 51 F.3d 1346. The rulings of the district court (App. 27-34, 35-40, 41-50, 51-59, 60-64, 65-66) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 25) was entered on April 6, 1995; petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on May 12, 1995. (App. 26.)

RULE INVOLVED

This case involves Rule 501 of the Federal Rules of Evidence:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress, or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, state or political subdivision thereof shall be determined in accordance with state law.

STATEMENT

In 1991, petitioner filed a lawsuit under 42 U.S.C. §1983 seeking damages for the death of her son, Rickie Allen, who had been killed by respondent MaryLu Redmond, a police officer employed by respondent Hoffman Estates, Illinois.

Redmond had shot Allen while responding to a "fight in progress" call. According to Redmond, she shot Allen as he

was chasing and about to strike another man with a knife. A knife was recovered near Allen's body; Redmond identified the knife as the weapon she had seen in Allen's hand.

Petitioner presented evidence at trial that Allen was unarmed and not threatening another when Redmond shot him. A paramedic who came on the scene shortly after the shooting and who removed Allen's body from the scene, testified that he had not seen a knife. (Tr. 590.) One of the first police personnel on the scene, a trainee, testified that he heard voices in the crowd yelling "They're moving the knife." (Tr. 234.) The first police officer to arrive at the scene after the shooting stated on cross-examination that he saw the knife on Allen's left side (Tr. 456); respondent Redmond testified that the knife was on Allen's right side. (Tr. 387.) Several of petitioner's witnesses testified that they saw a police officer planting a knife. (Tr. 120; Tr. 186, Tr. 267-68.)

The jury returned a verdict in favor of petitioner, awarding forty five thousand dollars on her civil rights claim and five hundred thousand dollars on her state wrongful death claim.

The Privilege Rulings

In the course of pre-trial discovery, petitioner learned that immediately after the incident, respondent Redmond had discussed the shooting with Karen Beyer, a social worker employed by respondent Hoffman Estates. When petitioner sought discovery from the social worker, respondent asked the district court to preclude such discovery, asserting that all conversations with the social worker were shielded by a psychotherapist-privilege.

On consideration of respondent Redmond's motion to quash, the district court held that the privilege issue was governed by federal, rather than state law. (Pet.App. 27-29.) The district judge relied on Proposed Rule of Evidence 504,

discussed *infra* at 7 n.2, and held that statements made to a social worker were not privileged. (Pet.App. 30.) The district court did, however, restrict to "counsel's eyes only" disclosure of information to be obtained from the social worker. (Pet.App. 31.)

In subsequent rulings, the district judge stated that he was only authorizing inquiry into discussions with the social worker that were "fact-oriented — that is, having to do with [the] description of the episode, recollections of the episode." (Pet.App. 36.) The trial judge authorized a "narrow inquiry." (Pet.App. 47.) Petitioner could inquire about the "subject matter" of conversations between respondent and the social-worker, but could not ask about conversations that were not directly relevant to the lawsuit. (Pet.App. 57.) The trial judge also held that petitioner's attorneys were entitled to review the notes made by the social worker "which relate to the subject matter" of conversations. (Pet.App. 58.) The district judge stated that he was not permitting "open season" (Pet.App. 57) and required that the deposition of respondent Redmond be supervised by a magistrate judge. (Pet.App. 38-39.)

In response to the district court's orders, respondent Redmond stated that she was unable to recall the contents of any of her numerous discussions about the shooting with the social worker. (Pet. App. 51.) The social worker refused to produce her records without respondent Redmond's authorization. (Pet.App. 61) Respondent refused to provide this authorization (id.) and, as a sanction, the district judge indicated that he would preclude Redmond from testifying at trial "as to her version of the event in which she shot Ricky Allen." (Pet.App. 62.)

On the eve of trial, the district court reconsidered, permitting Redmond to testify but holding that the jury would be

instructed about an adverse inference flowing from the non-production of the counseling records.[1] At trial, petitioner impeached Redmond with her inability to recall conversations about the shooting with the social worker. (Tr. 338-343.) Petitioner elicited testimony from the social worker that at one point in therapy, respondent could not recall pulling the trigger (Tr. 352), but that respondent was able to remember this event after 50 therapy sessions. (Tr. 353.) After respondents refused to produce the counselling records (Tr. 356), the district court instructed the jury on a negative inference, (Pet.App. 67), and the jury returned a verdict in favor of petitioner.

Ruling on Appeal

On respondents' appeal, the Seventh Circuit held that the district court had erred in requiring disclosure of any of the conversations between respondent and the social worker. The court of appeals recognized the conflict between the circuits on the existence of a psychotherapist privilege (Pet.App. 16-17), and held that a broad psychotherapist privilege would "encourage troubled individuals . . . to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors." (Pet.App. 18.) The Seventh Circuit concluded that the privilege should extend beyond psychiatrists and psychologists and apply to all "mental health care providers as well, including licensed clinical social workers." (Pet.App. 22 n.19.)

In the view of the Court of Appeals, the inquiry permitted by the district court into the subject matter of conversations with the social worker could only have resulted in

1. The district court found that the records were the property of respondent Village of Hoffman Estates. (Pet.App. 61.)

cumulative evidence (Pet.App. 23) and involved "confidential communications" that were protected from disclosure. (Pet.App. 23.) On this basis, the Seventh Circuit reversed the jury verdict and remanded for a new trial.

REASONS FOR GRANTING THE WRIT

This case raises important and recurring questions involving the existence and scope of a psychotherapist privilege in federal cases.

In adopting the Federal Rules of Evidence, Congress declined to adopt the psychotherapist-client privilege that had been proposed as Rule 504,[2] but adopted Rule 501, which permits the federal courts to look to "reason and experience" in considering claims of privilege not recognized at common law.

In its decision in this case, the Seventh Circuit, acknowledging a conflict among the circuits (App. 16), recognized a "psychotherapist privilege" applicable to all "mental health care providers." (App. 22 n.19.) The privilege, as fashioned by the Seventh Circuit, shields from disclosure everything that respondent Redmond told a social worker after killing petitioner's decedent Rickie Allen. (App. 23.)

The Court of Appeals for the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits have refused to recognize any

2. Proposed Rule 504 would have created a privilege for communications with a "psychotherapist," defined as "(A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition . . . or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged."

psychotherapist privilege. *Slakan v. Porter,* 737 F.2d 368 (4th Cir. 1989); *United States v. Moore,* 970 F.2d 48 (5th Cir. 1992); *In re Grand Jury Proceedings,* 867 F.2d 562 (9th Cir. 1989); *United States v. Burtrum,* 17 F.3d 1299 (10th Cir. 1994); *Hancock v. Hobbs,* 967 F.2d 462 (11th Cir. 1992);

The Second and Sixth Circuits have each recognized a psychiatrist-patient privilege. *In re Zuniga,* 714 F.2d 632, 637 (6th Cir. 1983); *In re Doe,* 964 F.2d 1325 (1992). The Sixth Circuit described its privilege as protecting the patient's "innermost thoughts," 714 F.2d at 640, and not shielding from disclosure the patient's name, or the fact and time of treatment. The Second Circuit recognized the privilege in a case seeking production of a witness' psychiatric history, 964 F.2d at 1328, and views the privilege as "a requirement that a court give consideration to a witness' privacy interests as an important factor to be weighed in the balance in considering the admissibility of psychiatric histories or diagnoses." Id. at 1329.

The broad privilege recognized by the Seventh Circuit in this case impedes petitioner's ability to prove her case. Petitioner sought to show that respondent Redmond made statements to the social worker about the shooting that were contrary to the version Redmond offered to the jury. Under the decision of the court of appeals in this case, anything that Redmond told the social worker — even an outright confession — is shielded from disclosure by the "mental health care provider" privilege.[3]

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3. At trial, Redmond stated that she was unable to recall the contents of her discussions with the social worker. (Tr. 338-343.) The social worker testified that at one point in therapy, respondent could not recall pulling the trigger (Tr. 352), but that she was able to remember this event after 50 therapy sessions. (Tr. 353.)

This Court has taken a cautious approach to expansion of common law privileges. See, e.g., *Trammel v. United States,* 445 U.S. 40 (1980); *United States v. Gillock,* 445 U.S. 360, 367-68 (1980); *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990). This approach has been followed by the five circuits which have refused to recognize any psychotherapist-client privilege, but was disregarded by the Seventh Circuit in this case.

The Seventh Circuit justified its adoption of a "mental health care provider" privilege by concluding that the privilege was required "to assist mental health professionals to succeed in their endeavors." (Pet.App. 18.) The empirical evidence, though is to the contrary:

> The presence or absence of an absolute psychotherapist-patient privilege actually has little impact upon a patient's willingness to reveal personal thoughts to a psychotherapist.
>
> Were the law purged of the psychotherapist-patient privilege, there would be little if any impact on treatment outcomes.
>
> J. Klotz, *Limiting the Psychotherapist-Patient Privilege: The Therapeutic Potential,* 27 Crim.Law.Bull 416, 417 (1991).

The question of whether there should be a "psychotherapist-client" privilege under Rule 501, and whether it should extend beyond psychiatrists and psychologists is a question that has received conflicting answers from the courts of appeals. Certiorari should be granted to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

August, 1995

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-1151

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR., and BRANDON ALLEN,

Plaintiffs-Appellees,

v.

MARY LU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4153—**Milton I. Shadur**, *Judge.*

ARGUED SEPTEMBER 14, 1994—DECIDED APRIL 6, 1995

Before WOOD, GODBOLD* and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* On June 27, 1991, Police Officer Mary Lu Redmond responded to a reported fight in progress at an apartment complex. When she arrived at the scene, she was advised that there had been a stabbing inside the building. Within minutes thereafter, Officer

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* The Honorable John C. Godbold, of the Eleventh Circuit, is sitting by designation.

Redmond stated that she fired her weapon and killed Ricky Allen, Sr. as he was pursuing and rapidly gaining on another man, and was poised to stab him with a butcher knife. Allen's surviving family members filed suit against Officer Redmond and her employer, the Village of Hoffman Estates, Illinois (the "Village"), alleging that Officer Redmond's use of deadly force violated Allen's rights under the Fourth and Fourteenth Amendments to the United States Constitution, and that Officer Redmond caused Allen's wrongful death under the Illinois Wrongful Death Act, 740 ILCS 180/0.01-2.2 (1994). Redmond and the Village appeal the $545,000 jury verdict. The appellants raise two issues on appeal: first, that the district court erred in instructing the jury on the use of deadly force; and second, that the district court erred by refusing to recognize a privilege for confidential communications between Officer Redmond and the licensed clinical social worker from whom she sought counseling. We affirm as to the first issue and reverse and remand as to the second issue dealing with the question of privilege.

I. BACKGROUND

A. *The Shooting*

On June 27, 1991, Officer Redmond, who was alone on patrol duty in that area on the day shift, responded to a dispatcher's report of a fight in progress at the Grand Canyon Estates apartment complex in the Village of Hoffman Estates, a suburb of Chicago, Illinois. Redmond was the first police officer to arrive at the scene. Officer Redmond testified that, as she pulled into the apartment complex parking lot, she saw two African-American women running toward her car, waving their arms above their heads,[1] one of whom stated that there had been a stabbing

[1] The two women waving their arms were Ricky Allen, Sr.'s sisters, Connie Allen and Sharon Allen.

inside the building. Redmond relayed this information to her dispatcher and requested assistance and an ambulance.

As Redmond approached the apartment building, five men ran out the front door yelling and screaming. One of the men was waving a pipe above his head. At this time, Officer Redmond testified that she ordered the man carrying the pipe to drop the pipe and also ordered everybody to the ground. After repeating the command "Drop the pipe" several times to no avail, Officer Redmond was forced to draw her service revolver. Almost immediately thereafter, two more men—a Caucasian man followed by an African-American man in hot pursuit—came running out of the door of the building. Officer Redmond testified that the African-American man, later identified as Ricky Allen, Sr., was armed with a butcher knife, was chasing and gaining on the Caucasian man, and was "directly behind" and poised to stab him when she fired the fatal shot. Officer Redmond testified that she commanded Allen to drop the butcher knife several times before firing:

> I ordered the black male subject with the knife to drop the knife several times. I told him to drop the knife and get on the ground. . . . I was yelling at him to drop the knife and get on the ground. . . . [H]e did not drop the knife and he did not get on the ground. . . . [I yelled] at least three times. I just kept yelling the minute I saw him.

Officer Redmond explained the moment before the shooting as follows:

> As [Allen] was gaining speed on the first subject until they were directly—he was directly in front of him, like the first subject's back, and then the second subject, as he was gaining on him the second subject, the male black subject with the knife took the knife back, raised it above his head and I waited, and as he started to come down with the knife and made the downward motion, I fired one shot at him.

Redmond testified that she "didn't even have time to square up,"[2] when she fired her weapon "[b]ecause the second subject was about to kill the first subject with the knife." She noted that only three or four seconds elapsed from the time Allen emerged from the apartment building door until the time she fired. Four of Allen's brothers and sisters, all of whom witnessed the shooting, testified that Allen was unarmed when Officer Redmond fired her weapon.

Officer Redmond testified that after she fired the single shot at Ricky Allen, Sr., he fell to the ground and she ran toward him with her gun at her side. She observed the butcher knife lying on the grass approximately two or three feet from his body. She repeated her request for backup support and an ambulance on her portable radio, as "people came pouring out of the buildings." Redmond stated that several people within the crowd "started to charge" at her, as they were "yelling," "screaming," "swearing" and "quite hysterical." She raised her gun when one person from the crowd came within arm's length, and ordered everyone "to get back, get down, get beyond the sidewalk, get on the ground." In her testimony, Officer Redmond made it clear that no one from the crowd attempted to come to Allen's aid, and that the knife was not moved from the place it landed when Allen fell to the ground until it was retrieved by one of the investigating officers.

Allen's siblings remembered the events just after the shooting differently. Connie Allen, his sister, testified that she attempted to approach her brother's body when Officer Redmond, with her gun raised, ordered her to get back and also stated that Redmond ordered her sister Sharon to step back at gunpoint. Connie Allen did not

[2] When the officer testified about having had insufficient time to "square up," she was stating that she did not have enough time to assume the proper stance before firing her weapon to ensure the most accurate aim.

observe a knife lying on the grass near her brother's body until after the ambulance had taken the body away. When asked at trial why she had not reported what she had seen to any of the police investigating the shooting, Connie stated that she had not felt like talking to anyone immediately after the shooting.

Officer Joe Graham arrived at the Grand Canyon Estates apartment complex shortly after the shooting. When he arrived, he saw a large crowd of people—approximately twenty-five to thirty African-Americans and five to ten Caucasians—gathered on the grass, and a number of people "rushing out of the apartment buildings—to see what was going on." Officer Graham observed Officer Redmond standing on the lawn, behind Allen's body, with her gun drawn and aimed at the crowd. Officer Graham testified during his deposition that Officer Redmond appeared "somewhat bewildered" when he first arrived at the scene, and later at trial he explained that he meant she was "visibly shaken or upset or disoriented." Officer Graham testified that the members of the crowd were "fluctuating back and forth . . . in a very chaotic movement," yelling that Officer Redmond "had shot Mr. Allen and that she didn't have to shoot him in the head" and that "they were going to sue the white bitch for shooting Mr. Allen." Officer Graham testified that when he knelt down to check for Allen's pulse, he saw a butcher knife lying on the grass approximately an arm's length away from the body.

B. *Officer Redmond's Counseling*

After the shooting, Officer Redmond sought counseling from Karen Beyer, a licensed clinical social worker[3] certi-

[3] Under Illinois law, a licensed clinical social worker provides "mental health services for the evaluation, treatment, and prevention of mental and emotional disorders . . . based on knowledge and theory of psychosocial development, behavior, psychopathology,

(Footnote continued on following page)

fied by the state of Illinois as an employee assistance counselor and employed by the Village. Officer Redmond met with Beyer for the first time three or four days after the shooting incident and continued counseling for approximately two or three sessions per week through at least January of 1992, six months after the shooting.[4]

During pre-trial discovery, the plaintiffs learned that Officer Redmond had participated in a number of counseling sessions with Beyer, the licensed clinical social worker. At Officer Redmond's deposition, the plaintiffs inquired regarding the substance of her communications with Beyer. Officer Redmond refused to respond to this line of questioning, contending that her communications with a licensed clinical social worker were privileged. The plaintiffs subsequently subpoenaed Beyer to testify at a deposition and to produce her credentials as a counseling professional as

[3] *continued*
unconscious motivation, interpersonal relationships, and environmental stress." 225 ILCS 20/3 (1994). A licensed clinical social worker is a person "who (1) has a master's or doctoral degree in social work from an accredited graduate school of social work and (2) has at least three years of supervised postmaster's clinical social work practice which shall include the provision of mental health services for the evaluation, treatment, and prevention of mental and emotional disorders." 405 ILCS 5/1-122.1 (1994). An individual cannot obtain a license to practice clinical social work until he or she passes an examination for the practice of clinical social work and has completed either (a) a master's degree in social work and 3,000 hours of satisfactory supervised clinical experience, or (b) a doctoral degree in social work and 2,000 hours of satisfactory supervised clinical experience. 225 ILCS 20/9 (1994). Karen Beyer, the Director of Health and Human Services for the Village, received her master's degree in social work from Loyola University in 1969. At the time of trial, she had had some twelve thousand hours of experience in individual, family, and marital psychotherapy, and had participated in clinical supervision in psychotherapy for doctoral psychology students from several psychology programs.

[4] All of Officer Redmond's conversations with Karen Beyer after June 27, 1991 took place during counseling sessions.

well as all her "notes, records, [and] reports pertaining to Mary Lu Redmond." The defendants, Redmond and the Village, moved to quash the subpoena, maintaining that all of Officer Redmond's communications occurring within the context of the counseling relationship, as well as Karen Beyer's notes and reports pertaining to those communications, were privileged. The trial court denied the defendants' motion to quash, based on the judge's belief that the psychotherapist/patient privilege recognized in other circuits does not extend to a licensed clinical social worker,[5] and ordered Karen Beyer to testify as to "the disclosures made to her by Ms. Redmond of the incidents of the day that relate to [the shooting]." We wish to point out that the Illinois statute specifically grants the psychotherapist/patient privilege to social workers. *See* 740 ILCS 110/2, 110/10 (1994). The court ordered Officer Redmond to appear for a third deposition session to answer questions concerning her communications with Karen

[5] The judge stated at the hearing on the defendants' motion to quash:

> But my sense has consistently been, when dealing with these problems, that the place to go as the best source is to look at what the Supreme Court's proposals had been and what have now been referred to as the "Standards," although they are not the Federal Rules of Evidence. And when I looked at that I found that Standard 504 is one that adopts a privilege for psychotherapists. Again referring to Weinstein at 504[03] at page 504-17, there is a psychotherapist-patient privilege, and that expressly does not apply to social workers. . . . So where I come out on this one is that someone who is engaging in a kind of counselling to assist someone, maybe over a traumatic experience—someone in the category of Ms. Beyer, who is identified as a licensed clinical social worker and a certified employee assistance counselor—does not stand entitled to privilege under the federal Standard, and that my perception is that the guide to how we should function in these cases, where we are looking at a federal claim as well as a state claim, is that it is the federal standard that ought to control and not the provisions of an Illinois statute that might extend beyond that.

Beyer. Officer Redmond appeared for the third deposition session, and again the answers she gave regarding her counseling sessions with Karen Beyer were evasive and incomplete, obviously an attempt to protect her privileged communications.

When Karen Beyer appeared for her deposition, she limited her answers to only those facts concerning disclosures made by Officer Redmond about the circumstances leading up to the shooting incident on June 27, 1991.[6] Beyer also refused to produce any notes or reports from Officer Redmond's counseling sessions. The plaintiffs filed another motion to compel Karen Beyer to answer certain questions to which objections had been made and to produce all of her notes and reports on Mary Lu Redmond. After Karen Beyer's second deposition session, the plaintiffs filed another motion to compel further responses, and the trial judge responded with an order permitting unrestricted and unlimited inquiry into statements made by Officer Redmond to Karen Beyer during their counseling sessions.[7] At her final deposition session, and again during trial, Officer Redmond responded "I don't recall" to the majority of questions dealing with the substance of her counseling sessions with her therapist and licensed clinical social worker, Ms. Beyer.[8] Ms. Beyer likewise refused to

[6] Karen Beyer also responded to general questions dealing with her credentials as a licensed clinical social worker and the timing and duration of her meetings with Officer Redmond.

[7] Judge Shadur commented at the hearing on the plaintiffs' motion to compel further discovery as follows:

> [M]y sense of the appropriate sanction, if you want to call it that, is to give the plaintiff access. . . . And that means that as far as I am concerned the bars are pretty well down to the opportunity to have access to Ms. Beyer in terms of what she recalls of those conversations. . . . [A]n unfettered type of examination of Karen Beyer . . . would be an appropriate course of action.

[8] We note that noncompliance with a court's order is justified when the order commands the revelation of privileged information, the disclosure of which would result in irreparable injury. *See In re Novak*, 932 F.2d 1397, 1401 n.7 (11th Cir. 1991).

divulge her communications other than the officer's factual description of the events leading up to the shooting. Karen Beyer did produce three pages of redacted notes.

On April 6, 1993, the district court ordered that Officer Redmond would be barred from testifying at trial as to her version of the shooting incident "because plaintiffs' attorneys have been blocked from effective cross-examination." Just prior to trial, on December 10, 1993, the trial judge reconsidered and vacated this ruling, but made it clear that the jury would be instructed that it could draw an adverse inference from the defendants' failure to produce Karen Beyer's notes and in fact gave such an instruction. At trial, the district judge instructed the jury that the defendants had no legal justification to refuse to produce Karen Beyer's notes of her counseling sessions with Officer Redmond. Over the defendants' objection, the district judge instructed the jury that it was "*entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.*" (Emphasis added.)[9]

[9] Jury Instruction No. 8 provided in full that

> You have heard evidence in this case that Karen Beyer, while an employee of the Village of Hoffman Estates, had numerous conversations with Mary Lu Redmond and made notes of those conversations. You have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates.
>
> *During the course of this lawsuit the Court ordered the Village of Hoffman Estates to turn over all of Ms. Beyer's notes to plaintiff's attorneys. The Village was provided with numerous opportunities to obey the Court's order and refused to do so. During the course of this lawsuit Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiff's attorneys.*
>
> During Ms. Beyer's testimony she referred to herself as a *"therapist," although she is not a psychiatrist or psychologist—she is a social worker. This Court has ruled that there is no legal justification in this lawsuit, based as it is on a federal constitutional claim, to refuse to produce Ms. Beyer's*

(Footnote continued on following page)

The trial judge also instructed the jury on the factors it could take into account in determining whether Officer Redmond's use of deadly force was proper. The court gave the plaintiffs' proffered Jury Instruction No. 5, over the defendants' objection, and rejected the defendants' Proposed Jury Instruction No. 7.[10] The defendants' Pro-

[9] *continued*

notes of her conversations with Mary Lu Redmond, and that such refusal was unjustified.

Under these circumstances, you are entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates.

(Emphasis added.)

[10] Jury Instruction No. 5 provided in full that

> Under the circumstances of this case, you may find that Mary Lu Redmond's use of deadly force caused Ricky Allen, Sr. to be deprived of his life without due process of law if and only if the deadly force was not necessary to prevent death or great bodily harm to another person.
>
> In determining whether the deadly force used by Mary Lu Redmond was necessary to prevent death or great bodily harm, you must consider all the facts and circumstances with which Mary Lu Redmond was confronted. For that purpose the reasonableness of Mary Lu Redmond's decision to use deadly force is to be judged from the perspective of a reasonable police officer who was confronted with the circumstances presented to Mary Lu Redmond at the moment the force was used. In other words, the question is whether a reasonable officer in Mary Lu Redmond's place would then have believed that Ricky Allen, Sr. was about to cause death or great bodily harm to another person and that deadly force was necessary to prevent such harm.
>
> What the circumstances are that were presented when Mary Lu Redmond used deadly force has been the subject of conflicting testimony and is for you to decide.

Defendants' Proposed Jury Instruction No. 7 provided in full that

> A police officer's use of force, whether deadly or not, is excessive and violates the constitution only if it is not objectively reasonable. Use of force is objectively reasonable if a reasonable officer on the scene, confronted with the same circum-

(Footnote continued on following page)

posed Jury Instruction No. 7 included two points omitted from the plaintiffs' Jury Instruction No. 5: first, that the jury should not consider a police officer's subjective intentions or motivations in using deadly force; and second, that the jury should make allowance for the fact that police officers frequently "have to make split second judgments under tense, uncertain, and rapidly evolving circumstances."

The jury returned a verdict in favor of the plaintiffs based on these jury instructions and awarded $45,000 for the federal constitutional claim and $500,000 for the state wrongful death claim. The defendants appeal.

II. DISCUSSION

Officer Redmond and the Village urge reversal on two grounds, arguing that: (1) the district court erred in instructing the jury on the use of deadly force; and (2) the

[10] *continued*

> stances, could have taken actions similar to those taken by the defendant Mary Lu Redmond.
>
> In determining whether the force used by the defendant is objectively reasonable, you must consider all of the facts and circumstances with which the defendant was confronted, including, but not limited to:
>
> 1. The information available to the defendant at the time of the incident;
>
> 2. The acts of the plaintiff(s) or plaintiff's decedent; and
>
> 3. Whether the plaintiff's decedent reasonably appeared to be a threat to the officer or to other persons.
>
> The defendant's subjective intentions or motivations, good or evil, should not be considered in determining whether she acted in an objectively reasonable manner.
>
> The reasonableness of the defendant's conduct is to be considered from the perspective of a reasonable officer at the moment the force was used, and not with the 20/20 vision of hindsight. In other words, you must make allowance for the fact that officers may have to make split second judgments under tense, uncertain, and rapidly evolving circumstances.

district court erred in refusing to recognize a privilege under Rule 501 of the Federal Rules of Evidence for confidential communications between Officer Redmond and Karen Beyer, the trained and experienced licensed clinical social worker from whom Redmond received counseling. Both of these asserted errors stem from the court's instructions to the jury. On appeal, our review of jury instructions is limited. *Doe v. Burnham*, 6 F.3d 476, 479 (7th Cir. 1993). Jury instructions "must be correct statements of the law that are supported by the evidence." *United States v. Perez*, No. 93-3003, slip op. at 11 (7th Cir. Dec. 22, 1994). We review jury instructions as a whole to determine " 'if the instructions . . . were sufficient to inform the jury correctly of the applicable law.' " *Patel v. Gayes*, 984 F.2d 214, 218-19 (7th Cir. 1993) (quoting *United States v. Villarreal*, 977 F.2d 1077, 1079 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 1350 (1993)). Reversal is warranted only if a jury instruction misguided the jury to a litigant's prejudice. *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 725 (7th Cir. 1994).

We thus undertake a two-part inquiry. "First, we determine whether the instruction misstates or insufficiently states the law. If so, we next determine whether the misstatement or deficiency likely confused or misled the jury causing prejudice to a litigant." *Burnham*, 6 F.3d at 479. We defer to the district court's discretion in formulating the specific wording of the instructions, so long as the instructions as given cover all of the essential points of the applicable law. *United States v. Scott*, 19 F.3d 1238, 1245 (7th Cir.), *cert. denied*, 115 S. Ct. 163 (1994).

A. *Fourth Amendment Deadly Force Jury Instruction*

Officer Redmond and the Village assert that the district court erred in giving Jury Instruction No. 5, and in failing to give Defendants' Proposed Jury Instruction No. 7, both of which addressed the objective reasonableness of Officer Redmond's use of deadly force. *See supra* n.10. The defendants note that the instruction given failed to

explain that a police officer's "subjective intentions or motivations, good or evil, should not be considered in determining whether [the officer] acted in an objectively reasonable manner" or to explain that police officers "may have to make split second judgments under tense, uncertain, and rapidly evolving circumstances." *See Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The defendants contend that these omissions rendered the given instruction insufficient as a matter of law. We disagree.

Excessive force claims, including deadly force claims,[11] resulting from any seizure are analyzed under the Fourth Amendment's objective reasonableness standard. *Jones v. Webb*, No. 94-1270, slip op. at 8 (7th Cir. Jan. 11, 1995); *Ford v. Childers*, 855 F.2d 1271, 1275 (7th Cir. 1988) (*en banc*). The objective reasonableness of a police officer's actions depends upon "the information [the officer] possessed immediately prior to and at the very moment [she] fired the fatal shot." *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) (*en banc*); *see also Graham*, 490 U.S. at 396 ("[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"). Relevant factors include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by

[11] We note that a police officer may, without violating the proscription of the Fourth Amendment, use deadly force to stop a suspected felon, if the officer has probable cause to believe that the suspect poses a threat of serious physical injury to *the officer or to another person. See Tennessee v. Garner*, 471 U.S. 1, 12, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985); *Sherrod v. Berry*, 856 F.2d 802, 805 (7th Cir. 1988) (*en banc*) ("*when an officer believes that a suspect's actions places him, his partner, or those in the immediate vicinity in imminent danger of death or serious bodily injury, the officer can reasonably exercise the use of deadly force*") (emphasis in original).

flight." *Graham*, 490 U.S. at 396. A police officer's subjective intentions are irrelevant; "evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will . . . good intentions make an objectively unreasonable use of force constitutional." *Id.* at 397. Moreover, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396-97; *see also Sherrod*, 856 F.2d at 805 (determination of propriety of police officer's use of deadly force requires analysis of "the knowledge, facts and circumstances known to the officer at the time [she] exercised [her] split-second judgment as to whether the use of deadly force was warranted").

We believe, in part considering our limited review of jury instructions, that the instruction the court gave was adequate. It was objective. The jury was instructed to consider all the facts and circumstances with which Mary Lu Redmond was confronted. This was to be "judged from the perspective of a reasonable police officer who was confronted with the circumstances presented to Mary Lu Redmond at the moment the force was used." It then emphasized whether a "reasonable officer" in her place would have believed "that the force was necessary to prevent the death, etc." We believe that the instruction was adequate and permitted both the parties to argue their theories of the case about times and other circumstances. It could have been amplified, but we need not adopt for an instruction the language various courts use in particular cases.[12]

[12] Although we do not believe that a more detailed instruction was necessary, we note that the evidence in this case was consistent with the Defendants' Proposed Jury Instruction No. 7. Each of the witnesses to the shooting testified that no more than four or five seconds elapsed from the time Ricky Allen, Sr., carrying

(Footnote continued on following page)

B. *Counseling Privilege*

Officer Redmond requests that we vacate the jury's verdict on the ground that the district court's instructions improperly stated to the jurors that they were permitted to draw an adverse inference from the defendants' failure to disclose information protected by the psychotherapist/patient privilege. The trial court's instruction explicitly allowed the jury to infer that Officer Redmond revealed unfavorable and damaging information to her therapist during her many counseling sessions; the judge told the jury that it was "entitled to presume that the contents of the notes would be unfavorable to Mary Lu Redmond and the Village of Hoffman Estates." Initially, we note that the existence and scope of evidentiary privileges are to be "governed by the principles of the common law as they may be interpreted by the courts of the United States

[12] *continued*

a butcher knife, emerged from the door of the apartment building until the time Officer Redmond fired her weapon. Officer Redmond was forced to make a life or death decision in a matter of seconds as she observed the butcher knife in the hand of the assailant move downward toward the back of his intended victim. Judge Shadur commented that "one of the problems with [defendants' proposed instruction is that] the split second business is . . . so inconsistent with [Officer Redmond's] own testimony." The situation Officer Redmond faced did not become life-threatening until the very moment when she observed Ricky Allen, Sr. project the butcher knife he held raised above his head in a downward motion toward the back of his intended victim. For that matter of seconds before Allen reached the man he was pursuing, Officer Redmond had no time to cogitate, wait or reflect on the question of whether or not to use deadly force. But once Ricky Allen, Sr. came within striking distance of the man he was chasing, Officer Redmond was forced to make a split-second decision to discharge her weapon in an attempt to save the life of Allen's intended victim. The fact that Officer Redmond may have observed Ricky Allen, Sr. chasing another man in a time frame of four or five seconds prior to the fatal moment does not change the instantaneous and split-second nature of the decision she was forced to make.

in the light of reason and experience." Fed. R. Evid. 501.[13] The Supreme Court has observed that Rule 501 "manifested an affirmative intention not to freeze the law of privilege" but that its purpose was to " 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.' " *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (citations omitted).

This is a case of first impression before the Seventh Circuit, questioning the existence of a federal privilege for confidential communications between a licensed clinical social worker and a patient. The Second and Sixth Circuits have determined that "reason and experience" compel the recognition of the psychotherapist/patient privilege in both civil and criminal cases. *In re Doe*, 964 F.2d 1325 (2d Cir. 1992); *In re Zuniga*, 714 F.2d 632 (6th Cir.), *cert. denied*, 464 U.S. 983 (1983). In contrast, the Fifth, Ninth, Tenth, and Eleventh Circuits have rejected the privilege in factual situations not even remotely similar to the one before this court, each interpreting Rule 501 as limiting the development of privileges to those recognized by the common law. *See United States v. Burtrum*, 17 F.3d 1299 (10th Cir. 1994) (declining to recognize a psychotherapist/patient privilege in criminal child sexual abuse case); *In re Grand Jury Proceedings*, 867 F.2d 562 (9th Cir.), *cert. denied*, 493 U.S. 906 (1989) (rejecting assertion of a psychotherapist/patient privilege by target of grand jury murder investigation); *United States v. Corona*, 849 F.2d 562 (11th Cir. 1988), *cert. denied*, 489 U.S. 1084 (1989) (refusing to recognize a psychotherapist/patient privilege in criminal firearms case); *United States v. Meagher*, 531 F.2d 752 (5th Cir.), *cert. denied*, 429 U.S. 853 (1976) (rejecting criminal defendant's assertion of psychiatrist/patient privilege in bank robbery trial). With the exception of the Tenth Circuit's decision in *Burtrum*, which involved admissions by a pedophile to his therapist of criminal child sexual assault,[14] the decisions refusing to recognize the psychotherapist/patient privilege are at least five years old. Much has changed with the mental health field in the past five years.[15] The need, and demand, for counseling services has skyrocketed during the past several years due to the rapid spread of violence and crime throughout our nation. Countless innocent bystanders, as well as law enforcement officers themselves, witness violent crimes and homicides.[16] These unfortunate individuals, who in-

[13] Congress chose not to specifically adopt the psychotherapist/patient privilege proposed for inclusion in the Federal Rules of Evidence, but instead adopted Rule 501, which directs the federal courts to develop privilege rules "in the light of reason and experience" and to be guided by statutes of the respective states providing for the privilege.

[14] Significantly, the district court in *Burtrum* recognized a qualified psychotherapist/patient privilege, but, in applying the balancing test articulated in *In re Doe*, 964 F.2d at 1328, the district court concluded that "the public interest in protecting young children from sexual abuse 'far outweighs the [defendant's] personal privacy interest and the need for informed medical assistance.' " *Burtrum*, 17 F.3d at 1301. The Tenth Circuit, in affirming, held *only* that the psychotherapist/patient privilege would not apply in the criminal child sexual abuse context. *Id.* at 1302. Implicit in this holding is the possibility that the Tenth Circuit would recognize the psychotherapist/patient privilege in a different context.

[15] "The psychological counseling privilege has gained recognition since the 1950s, when psychology and psychotherapy attained professional legitimacy." Developments in the Law—Privileged Communication: Part IV. Medical and Counseling Privileges, 98 Harv. L. Rev. 1530, 1530 (1985) (citing Louisell, The Psychologist in Today's Legal World (pt. 2), 41 Minn. L. Rev. 731, 731-35 (1957)) (hereinafter "Developments in the Law: Part IV").

[16] Although police shootings are not uncommon, we have in recent years seen outbreaks of violence and killings in a wide variety of public settings, including hospitals, schools, post offices, abortion clinics and street corners. A quick glance at newspaper headlines in recent months illustrates the violence and trauma innocent bystanders witness all too often: on January 26, 1995, a gunman opened fire near the University of North Carolina-Chapel Hill campus, killing a student and a bicyclist; on December 30,

(Footnote continued on following page)

clude not only law enforcement personnel, but also students, school and hospital employees, postal workers, and members of the general public, need and deserve the help, support, and emotional release provided by confidential counseling. The recognition of a psychotherapist/patient privilege can only serve to encourage troubled individuals, as well as those who witness, participate in, and are intimately affected by acts of violence in today's stressful, crime ridden, homicidal environment, to seek the necessary professional counseling and to assist mental health professionals to succeed in their endeavors.

We agree with the Second and Sixth Circuits that reason and experience compel the recognition of a psychotherapist/patient privilege. Reason tells us that psychotherapists and patients share a unique relationship, in which the patient's ability to communicate freely without the fear of public disclosure is the key to successful treatment. *See In re Zuniga*, 714 F.2d at 640 ("*[t]he essential element of the psychotherapist-patient privilege is its assurance to the patient that his innermost thoughts may be revealed [to his therapist] without fear of disclosure*" in order that the patient might receive adequate treatment) (emphasis added).

> "The psychiatric patient . . . exposes to the therapist not only what his words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame. Most patients who undergo psychotherapy know that this is what will be expected of them, and that they cannot get help except on that condition. . . . It would be too much to expect them to do so if they knew that all they say—and all that

[16] *continued*
1994, a man shot and killed two women at two abortion clinics in Brookline, Massachusetts; and on February 8, 1993, three doctors were wounded in a shooting rampage by an emergency room patient at the County-USC Medical Center in Los Angeles, California. The number of shooting incidents at schools is, distressingly, too high to count.

> the psychiatrist learns from what they say—may be revealed to the whole world from a witness stand."

In re Zuniga, 714 F.2d at 638 (quoting *Taylor v. United States*, 222 F.2d 398, 401 (D.C. Cir. 1955) (quoting Guttmacher and Weihofen, Psychiatry and the Law 272 (1952))). Moreover, communications with a psychotherapist often involve highly personal matters, the disclosure of which "would frequently be embarrassing to the point of mortification for the patient." *In re Doe*, 964 F.2d at 1328. Indeed, courts and commentators have focused on an individual's right of privacy, "a fundamental tenet of the American legal tradition," to justify the psychotherapist/patient privilege. *See, e.g.*, Developments in the Law: Part IV, 98 Harv. L. Rev. at 1544-47 ("[c]ompelled disclosure of information communicated by a patient to a psychotherapist will therefore often threaten the privacy of the patient's most intimate thoughts"); *In re Lifschutz*, 2 Cal. 3d 415, 431-32, 85 Cal. Rptr. 829, 839 (1970) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965)) ("We believe that a patient's interest in keeping such confidential revelations from public purview, in retaining this substantial privacy, has deeper roots than the [state] statute and draws sustenance from our constitutional heritage. . . . [T]he United States Supreme Court declared that 'Various guarantees [of the Bill of Rights] create zones of privacy,' and we believe that the confidentiality of the psychotherapeutic session falls within one such zone").

> Privacy serves several functions: it allows room for personal autonomy, it permits necessary emotional release, and it promotes free self-evaluation. The privacy rationale, however, regards the privacy of individuals as important not only in fostering these ends, but also as an end in itself. Compelled disclosure is considered inherently wrong because it inflicts two distinct kinds of harm: (1) the embarrassment of having secrets revealed to the public, and (2) the forced breach of an entrusted confidence.

Developments in the Law—Privileged Communication: Part II. Modes of Analysis, 98 Harv. L. Rev. 1471, 1481 (1985) (citations omitted).

We are cognizant of the fact that *all fifty states have recognized the need for and have adopted varying forms of the psychotherapist-patient privilege.*[17] *See* Developments in the Law: Part IV, 98 Harv. L. Rev. at 1539 ("the psychotherapist-patient privilege has won consistent approval from courts and commentators"). Although federal common law governs our recognition of privilege in this case, *see In re Pebsworth*, 705 F.2d 261, 262 (7th Cir. 1983), the law of privilege as developed by the states is not irrelevant as the Supreme Court "has taken note of state privilege laws in determining whether to retain them in the federal system." *United States v. Gillock*, 445 U.S. 360, 369 n.8, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980); *see also Memorial Hospital v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (quoting *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976)) (" '*[a] strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy*' ") (emphasis added); *William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982) (federal courts are not precluded from "resort[ing] to state law analogies for the development of a federal common law of privileges in instances where the federal rule is unsettled"). *The widespread*

[17] *See* Developments in the Law: Part IV, 98 Harv. L. Rev. at 1539 (noting that by 1985, 45 states, not including Alaska, Iowa, Nebraska, South Carolina and West Virginia, had enacted psychotherapist/patient privileges); Alaska Stat. § 08.86.200 (1994); Iowa Code § 622.10 (1993); Neb. Rev. Stat. § 27-504 (1994); S.C. Code Ann. § 44-22-90 (Law. Co-op. 1993); W. Va. Code § 27-3-1 (1994). *Many of these state statutes specifically extend to communications with licensed clinical social workers. See, e.g.*, Cal. Evid. Code § 1010 (West 1994); Fla. Stat. ch. 90.503 (1994); Va. Code Ann. § 8.01-400.2 (Michie 1994).

recognition of the psychotherapist/patient privilege in all fifty states is strong evidence that "experience with [the privilege] has been favorable." In re Doe, 964 F.2d at 1328 (emphasis added).

Particularly significant to the case before the court is the *Illinois Mental Health and Developmental Disabilities Confidentiality Act*, 740 ILCS 110/1-110/17 (1994), which expressly recognizes a psychotherapist/patient privilege:

> *[I]n any civil*, criminal, administrative, or legislative proceeding, *or in any proceeding preliminary thereto, a recipient*, and *a therapist* on behalf and *in the interest of a recipient, has the privilege to refuse to disclose and to prevent the disclosure of the recipient's record or communications.*

Id. at 110/10 (emphasis added). The term "therapist," as defined by the statute, includes any "psychiatrist, physician, psychologist, *social worker*, or nurse providing mental health or development disabilities services . . . ." *Id.* at 110/2 (emphasis added). Illinois law thus explicitly extends the privilege to communications with a licensed clinical social worker, like Karen Beyer.

For these reasons, *we recognize the existence of a psychotherapist/patient privilege under Rule 501 of the Federal Rules of Evidence.*[18] However, we also note that the privilege we recognize in a case of this nature requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests. *In re Doe*, 964 F.2d at 1328; *see Trammel*, 445 U.S. at 52 (the question is "whether the privilege . . . promotes sufficiently important interests to outweigh the need for probative evidence in the administration of

[18] We note that the psychotherapist/patient privilege protects only confidential communications, *i.e.*, all the information learned by the psychotherapist or counselor during treatment that is necessary for treatment. *See* Developments in the Law: Part IV, 98 Harv. L. Rev. at 1540.

. . . justice"); *cf.* Fed. R. Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"); Developments in the Law: Part IV, 98 Harv. L. Rev. at 1544-47 ("Because the privilege impedes the judicial truth-seeking function, courts and legislatures have generally limited the privilege to cases in which its application would be consistent with its underlying purposes of facilitating medical diagnosis and treatment"). We acknowledge that "[e]videntiary privileges in litigation are not favored." *Herbert v. Lando*, 441 U.S. 153, 176, 99 S. Ct. 1635, 60 L. Ed. 2d 115 (1979). "Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 711, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). Accordingly, we will determine the appropriate scope of the privilege "by balancing the interests protected by shielding the evidence sought with those advanced by disclosure." *In re Zuniga*, 714 F.2d at 640.

We decline to speculate as to what situations would call for the abrogation of this privilege. Instead, we confine our analysis to a factual situation of this nature, where the balance of the competing interests tips sharply in favor of the privilege if we hope to encourage law enforcement officers who are frequently forced to experience traumatic events by the very nature of their work to seek qualified professional help. The plaintiffs sought disclosure of the confidential communications between Officer Redmond and Karen Beyer, a licensed clinical social worker.[19]

[19] Professionals with quite a variety of job titles and descriptions provide mental health care to patients. Although we have consistently referred to the privilege we recognize in this case as *the psychotherapist/patient privilege, we note that this privilege extends*

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There were numerous eyewitnesses to the shooting, including Officer Redmond and several of Allen's brothers and sisters, four of whom testified at trial; Officer Redmond testified at trial as to her recollection of the circumstances leading up to the incident. Thus, the plaintiffs' need for Officer Redmond's personal innermost thoughts about the shooting incident were cumulative at best. In contrast, Officer Redmond's privacy interests were, and are still, substantial. Officer Redmond sought professional counseling after an unquestionably traumatic and tragic event she experienced in the line of duty. Her ability, through counseling, to work out the pain and anguish undoubtedly caused by Allen's death in all probability depended to a great deal upon her trust and confidence in her counselor Karen Beyer. Officer Redmond, and all those placed in her most unfortunate circumstances, are entitled to be protected in their desire to seek counseling after mortally wounding another human being in the line of duty. An individual who is troubled as the result of her participation in a violent and tragic event, such as this, displays a most commendable respect for human life and is a person well-suited "to protect and to serve." Based on the facts and circumstances presented in this record, we recognize the existence of the psychotherapist/patient privilege in this Circuit and thus the confidential communications between Mary Lu Redmond and her licensed clinical social worker Karen Beyer are protected from compelled disclosure.

[19] *continued*
to other mental health care providers as well, including licensed clinical social workers. Drawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose. Indeed, social workers have been characterized as the " 'poor person's psychiatrist.' " Developments in the Law: Part IV, 98 Harv. L. Rev. at 1550 (quoting Comment, Underprivileged Communications: Extension of the Psychotherapist-Patient Privilege to Patients of Psychiatric Social Workers, 61 Calif. L. Rev. 1050, 1050 (1973)).

III. CONCLUSION

The judgment of the district court is REVERSED and the case is REMANDED for a new trial consistent with this opinion.

A true Copy:
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Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004
CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs-Appellees,

v.

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4153 **Milton I. Shadur,** *Judge.*

[April 6, 1995]

JUDGMENT — ORAL ARGUMENT

Honorable John C. Godbold, Circuit Judge*
Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge

The judgment of the District Court is REVERSED and the case is REMANDED for a new trial, in accordance with the decision of this court entered on this date. Each party to bear their own costs.

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* The Honorable John C. Godbold, of the Eleventh Circuit is sitting by designation.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1004
CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs-Appellees,

v.

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 4153 **Milton I. Shadur,** *Judge.*

[May 12, 1995]

ORDER

Honorable John C. Godbold, Circuit Judge*
Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiff-appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* The Honorable John C. Godbold, of the Eleventh Circuit is sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr.
and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR.
and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and
VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
March 26. 1992

[2] THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman Estates. Motion for protective order, motion to quash.

MR. ROGUS: Good morning, your Honor. Gregory Rogus appearing on behalf of the defendants.

MR. FUTTERMAN: Good morning, your Honor. Ronald Futterman on behalf of the plaintiffs.

THE COURT: Good morning.

Well, there are two issues that are presented here. One is the protective order motion on the part of the plaintiffs. The other one is this motion to quash filed by the defendants, as to which I have received a preliminary response after I had done my own homework anyway.

Let me, if I may, deal with that motion to quash first, something that gave me in the immortal Yogi Berra's words a sense of "Deja vu all over again," because as both of you know our Court of Appeals in a case called *Memorial Hospital against Shadur* dealt with the related issue, you know. I hauled that out. That's

664 F.2d 1058, and at page 1061 footnote 3, the court confirmed, as I had held below in the case that the unsuccessful mandamus was taken from, that where there were state and federal claims, the federal claim is the one that would basically control issues of admissibility (which are of course closely linked up with issues of discoverability), although we certainly look to state law to inform the judgment about what the federal law should be under Federal Rule of [3] Evidence 501.

What I also did in terms of a little more homework was to see whether there was any further enlightenment on that general approach since then, and I found another familiar case *von Bulow against von Bulow* out of the Second Circuit. That's 811 F.2d 136 at page 141. That said in part, where there were in that case a RICO claim and state law claims based both on diversity jurisdiction and also on what was then pendent jurisdiction, now supplemental jurisdiction, the court said:

> "The evidence sought from the witness [as to whom a privilege, you see, was claimed] is relevant to both the federal and state claims. In such situations courts consistently have held that the asserted privileges are governed by the principles of federal law. . ."

[citing two cases, one of them the Memorial Hospital case, then going on to say]:

> "This approach is consistent with the legislative history of Rule 501" [quoting the Senate Report and so on].

So I think that it's pretty plain that that's where we go for the answer.

When I looked at Weinstein on Evidence I found that Judge Weinstein, and this is at paragraph 501[02] at page 501-25, said (although he didn't agree with the principle totally) that the Judiciary Committee's Report had said that "[i]f the rule [that was there] proposed results in two [4] conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rules favoring reception of the evidence should be applied."

Now you know that kind of tie breaker is something that has some things of course to commend it and others not, because it doesn't, I think, give sufficient weight perhaps to underlying policies. But looking further, what I have found controlling here is that as both of you know when Rule 501 was adopted Congress vetoed what the Supreme Court had proposed. The Supreme Court had proposed a whole series of provisions very much along the same lines as what was done with Rule 803, the hearsay rule — that is, it had set out a whole series of proposed privileges and defined them. And Congress then torpedoed that by requiring what we now have, which is the short and quite ambiguous version that calls on us to do a lot of creative thinking and application.

But my sense has consistently been, when dealing with these problems, that the place to go as the best source is to look at what the Supreme Court's proposals had been and what have now been referred to as the "Standards," although they are not the Federal Rule of Evidence. And when I looked at that I found that Standard 504 is one that adopts a privilege for psychotherapists. Again referring to Weinstein at 504[03] at page 504-17, there is a psychotherapist-patient privilege, and that expressly does not apply to social workers. It views [5] social workers as not in the same professional capacity, unless the social workers are acting in conjunction with and basically as aids to the medical professions.

Well, maybe I misspeak in referring to "medical professional." I don't want to pause on the distinction between psychiatrist and psychologist. But let me characterize it as the professional whose work it is whose basic activity it is to participate in this in terms of the sort of established discipline that is not ascribed to the social worker, who despite the training (and perhaps despite licensing) is not placed in the same category.

What Weinstein says — and this is at page 504-19 to 20 — he says:

> "It has been suggested that the same reasoning applies to social workers not licensed as psychologists to the extent that they are performing diagnostic or treatment functions. Effective therapy by a social worker benefits society but cannot be rendered unless the client feels free to divulge potentially damaging information. Nevertheless, unlike statutes in some jurisdictions, the Federal

Evidence Standard does not exempt communications to social workers from disclosure unless the social worker is participating in diagnosis and treatment under the direction of a psychotherapist."

Then later on in 504[05] the description of the same [6] Standard goes on to say this, and this is at page 504-24:

> "In addition, Standard 504(a)(3) treats as confidential those communications made to the psychotherapist in the presence of a third group of persons, those 'who are participating in the diagnosis and treatment under the direction of the psychotherapist, including members of the patient's family.' Communications to social workers, psychologists engaged in functions not covered by subdivision (a)(2)(B) and other nonpsychotherapist treatment personnel are confidential if a psychotherapist is presented and authorized and is supervising their participation."

So where I come out on this one is that someone who is engaging in a kind of counselling to assist someone, maybe over a traumatic experience — someone in the category of Ms. Beyer, who is identified as a licensed clinical social worker and a certified employee assistance counselor — does not stand entitled to privilege under the federal Standard, and that my perception is that the guide to how we should function in these cases, where we are looking at a federal claim as well as a state claim, is that it is the federal standard that ought to control and not the provisions of an Illinois statute that might extend beyond that.

And of course I recognize, and it should be plain I think from what I have said, that this is an area in which there [7] are competing interests. But it seems to me that whenever we talk about resolving competing interests we have to make judgments about where the weight falls in terms of those. And where the key claim that's involved is, for example, a 1983 claim — a federal claim — my sense is that the federal rule ought to apply in precisely the same way as if the 1983 claim were the only claim in the case. So that I think that the balancing of interests comes down to a denial of the motion to quash.

Now I took a look at the response filed by plaintiffs for the motion to quash, as well as the defendants' motion. And I ought

to make plain that the first question that Mr. Futterman had directed, which is whether the Court ought to recognize the therapist-patient privilege, seems to me not to be presented by the case for the reason I've mentioned. That is, I am perfectly willing to treat the therapist-patient privilege if that is meant to include the one that the Standard covers. And that's the issue that was dealt with in both *Zuniga* and *Corona* as applicable.

It is rather the second question Mr. Futterman raises that I am focusing on. And incidentally, you know when I looked at Judge Marshall's opinion, *Jennings against D.H.L. Airlines*, there is nothing in that that is at all inconsistent with what I've said here, because he was dealing with someone of a quite different category. The one by Magistrate Judge Rodovich, that [8] *Cunningham against Southlake*, of course makes a determination exactly the one that I have just identified. So my ruling on that one is that the motion to quash is denied.

Now having said that, it seems to me that it is appropriate nonetheless to follow the same principle that I have dealt with in a couple of the earlier matters in this case — and that is, to make sure that there is an appropriate protective order that's in place. And in this instance it strikes me that a "counsel's eyes only" protective order would be quite appropriate unless there is some suggestion as to why that should not be applicable.

MR. FUTTERMAN: The only exception to that, your Honor, is the possibility that we may desire to consult a clinical psychologist —

THE COURT: Another — a professional, you mean?

MR. FUTTERMAN: Yes.

THE COURT: But you are not talking — when I talk about that I really want to make sure that the client is insulated from this — that is, I consider the lawyers as professionals in this one. And if what you are saying is that for evaluative purposes you might want to consult a professional —

MR. FUTTERMAN: Yes. I have no problem with your Honor barring the clients — our clients — from having access to the deposition or being present at the deposition.

[9] THE COURT: Okay. Mr. Rogus?

MR. ROGUS: I anticipate in light of the Court's ruling this morning several problems. Namely, with all due respect to the Court and the Court's holding with regard to my motion, I have the interests of obviously Redmond to assert. I am anticipating that Ms. Beyer will, in disagreement with the Court's ruling, refuse to respond to questions and produce the records. I think the only thing I can suggest at this point —

THE COURT: You are going to have a replay —

MR. ROGUS: — is draw it to the Court for consideration, given the novelty of this issue and the importance of its bearing upon this case and where we go from here, if we could certify this question to the appellate court.

THE COURT: Well, it doesn't qualify. You know there was just an opinion that came out in the Seventh Circuit, by the way, within the last week in which at least the panel that was writing the decision (I think it was Judge Wood who wrote it) was reviewing an effort by my former colleague Judge Bua to create appealability where it was not available, and the court rejected that. It found that there was no final order, and in the course of it commented on a colloquy that Judge Bua had had with the lawyers in the case saying, "You know, those people up there, they never take 1292(b) certifications, they never take 54(b) certifications, so we've got to find a different remedy."

So Judge Wood's opinion says very carefully, "Well now [10] wait a minute. You know we have honored 1292(b) certifications in this situation and that situation, and we have honored 54(b) certifications in this situation and that one." And of course the problem is, it's sort of like "What panel do you listen to?" because his colleagues on that panel were not among those who have given the most difficulty for that kind of effort to get piecemeal appeals, as some members of the court are fond of calling them, you know. But the point seems to me that, even accepting that invitation as posed, we are not here dealing with a controlling question of law. That is, we are dealing with something that's an interesting and useful matter in the course of this litigation, but you can hardly characterize it as a controlling question of law.

And I don't think that this is a good candidate for 1292(b) certification. When I said you may replay it, for all you know, if you want to make — want to bring the issue on — there are ways in which you may be able to do that. That's up to you.

But my determination is that this is one in which I perceive the Supreme Court's then 8 to 1 vote, that would have established the Standard that I have just identified, as being the best guide for any District Judge in terms of dealing with such privilege issues. And when it comes to balancing the competing interests, it seems to me that there is a great of weight that has to be ascribed to that, notwithstanding the fact that a particular state may have, as Illinois has, included in its statute and in its categories of people who are within the scope of that statute, people labeled as "social workers." You know, that may represent the results of lobbying effort. Although you know I don't want to personalize this, I have a daughter who is a certified social worker. I know the training that's involved. And you know, with all respect, it is simply not the same in the professional context as the established disciplines to which I have referred. And that, I think, properly informed the Standard that the Supreme Court adopted.

So you know I recognize that there are things to be said on both sides of it. But it seems to me that when we are dealing with a federal claim, the kind that Congress has said is available under Section 1983, the balancing tips substantially in the direction I've indicated.

So anyway that's my ruling.

MR. FUTTERMAN: Your Honor, with respect to the protective order, Mr. Rogus informed me this morning that he would like to address a couple of concerns that he has with respect to it in some dialogue with me today, and if we can't reach agreement on language we would come back tomorrow. I have heard briefly what his concerns are, and I am optimistic that we might be able to work it out. It's just that we have not heard anything to that effect today.

THE COURT: All right. I will simply enter and [12] continue that one. Okay?

MR. FUTTERMAN: All right.

THE COURT: And I won't set it for tomorrow. That is, if you are able to resolve the matter as between you, and you want to tender a proposed form of protective order, you can do that. If you can't resolve the issue, then if you have to come in on the motion what you ought to do is just let my minute clerk know. You are not going to have to re-serve notice. But there is no particular point of my putting it on the schedule if you're not sure of whether it is going to have to be done in that form or not. Don't you think that that makes sense?

MR. FUTTERMAN: Sure. We will try to resolve our differences today and submit a draft order tomorrow.

MR. ROGUS: I share Mr. Futterman's optimism. I think we will be able to work something out between the two of us.

THE COURT: Fine. Thank you very much.

MR. ROGUS: Thank you, your Honor.

MR. FUTTERMAN: Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
April 14. 1992

[2] THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman Estates. Plaintiff's motion to compel presence at deposition.

MR. FUTTERMAN: Good morning, your Honor. Ronald Futterman on behalf of the plaintiff.

MR. FLAXMAN: Kenneth Flaxman on behalf of the plaintiff.

MR. ROGUS: Gregory Rogus on behalf of the defendants.

Your Honor, I have prepared, and intended to file yesterday, a written objection to the plaintiff's motion, but we ran into the problem of the building being closed down, and I had courtesy copies prepared and they told me I couldn't drop them off by you yesterday. I would seek leave of court to file written objections.

THE COURT: Sure. And George, do you want to hand that to me?

(Document tendered)

I had read your letter, of course, which was included as part of your submission.

Well, Mr. Rogus, the difficulty with what you are asserting here is in what you assume the purpose of this discovery to be, if the purpose were to look into the officer's current mind set or any impact on the officer of the episode, clearly that's not something that would come into the case, because you're quite right the issue is one of objective reasonableness: How would the reasonable law enforcement person [3] confronted with the situation have reacted?

But you see the difficulty is that part of what has to be determined in order to arrive at that is to identify what the circumstances really were. And there is a high likelihood, I would think, that to the extent that discussions have taken place between your client and this consultant Karen Beyer, to the extent that they are fact-oriented — that is, having to with description of the episode, recollections of the episode, all those things — they go directly to that issue. You know, resolving issues of fact is almost invariably a matter of resolving differing versions, differing recollections. And it is just as much an appropriate source of discovery to determine what the other side's perception is as it is to advance a party's perception.

Especially, you know, Rashomon is a familiar reference (I don't know whether that won the Academy Award, but it certainly should have, if it didn't) — and it's so apt for lawsuit situations that it's very hard to imagine a more direct parallel. All the psychological studies about how witnesses react to instantaneous situations — the familiar examples in which somebody says it was a blue car and somebody says it was a red car — serve as the best possible illustration of the fact that the way to sort out facts is to get the different witnesses, recollections and versions. And that's really the focus, you see, of the determination that I made. It wasn't [4] that inquiry was appropriate because it was a consultation with somebody who was in a counselor position. It wasn't because of the relationship that the determination was made that it was a nonprivileged communication. It was because that communication, to the extent that it elicited information that could lead to admissible evidence, which is the standard under Rule 26(b)(1), is just as much something for a party's access as any other item.

MR. ROGUS: That still leaves me in some doubt, your Honor, with regard to counsel's stated intention of his using the

information to consult some expert or some psychologist on his side of the case.

THE COURT: Well, I don't know. You know —

MR. ROGUS: I don't know if that enters into his actual intentions or not. All I know is that he did state it in open court when we were before your Honor on March 26th, and I not quite sure where that fits into the equation.

THE COURT: Well, you don't know how they want to use it. They may want to consult with people on the theory of memory or anything. I haven't the slightest notion. But there is no reason that they can't make such use of it in that sense. One thing they are not going to be able to do, of course, and I have not even suggested this, is to let us say to have their own expert designated for purposes of conducting a mental examination of your client. That's not in issue. All we are [5] dealing with here is the question about discovery of prior communications.

So what you have said is really not responsive to the point that's made here.

MR. ROGUS: Your Honor, if I may then — well, perhaps I am anticipating the ruling at this point — but I would point out that in plaintiff's motion he has included excerpts from Ms. Redmond's deposition, with regard to specific questions that he intended to put to Ms. Redmond. And if I am to understand the court will —

THE COURT: Let me see. I don't have that. I have your response in front of me. George — wait a minute. I have got your motion. Wait a minute — their motion. Let me take a look at that.

MR. ROGUS: I believe they are —

THE COURT: Which one are you seeking to refer to?

MR. ROGUS: Well, at page 190 of the transcript that is attached to his motion —

THE COURT: Yes.

MR. ROGUS: There is a list of questions that Mr. Futterman put on the record, and which I believe would be the subject of the

present motion. I guess my inquiry at this point would be as to whether the Court's present ruling would pertain to all of these questions or just some of them, because some of them I think will go beyond. [6]

THE COURT: Well, I don't know how it would be relevant to how long the counseling should continue. That doesn't seem to me to be in it. But for example the discussion of subjects other than the shooting might be, I don't know. I am not going to permit one question to serve as a springboard to get into nonrelevant issues, but that's kind of a background question. The question about whether she's discussed the counseling sessions with Karen Beyer with anyone else, doesn't —

MR. ROGUS: She has answered that question. Because that did not go into content, as you can see from the next several lines thereafter.

THE COURT: Okay.

MR. ROGUS: On page 191.

THE COURT: Well, if the —

MR. FUTTERMAN: Your Honor, it's theoretically possible that she may have waived the privilege already.

THE COURT: I understand.

MR. FUTTERMAN: We have asked Mr. Rogus to make available the persons who have been identified as the persons to whom disclosures about the counseling sessions have been made.

THE COURT: Yes. Right. And I was going to say — you know, before Mr. Rogus talked about that having been responded to, that one obvious purpose of that is to go into potential waiver of any asserted privilege in any event. The [7] question about discussion of the emotional state immediately prior to firing is I think — you know, all that these questions present are nonsubstantive issues — that is, the talk about scope of discussion rather than inquiring into the particulars. So it seems to me that it's really premature for me to be ruling on these.

What I would suggest that you ought to do is when you resume the depositions, simply make arrangements for the Magistrate

Judge who is assigned to the case, see about his or her availability during the course of the deposition in case any questions arise as to which there is a dispute. And you can — I don't know who that is.

MR. FUTTERMAN: I think it is Magistrate Lefkow. I am not sure.

MR. ROGUS: I don't have the Magistrate designated.

MR. FLAXMAN: Do we need a specific order to —

THE COURT: Yes. George, what we will have to do is to enter an order referring — I am going to enter a general order referring discovery matters, although don't misunderstand. If you have disputes about the sort of thing that has been presented to me in the past, you need not concern yourself. You can come back in here, because I don't want to saddle the Magistrate Judge with more than would be necessary. But the general order of reference will then suffice so that you can consult with him or her. Okay. [8]

MR. FUTTERMAN: But, your Honor, I think we will need an order with respect to motion to compel her appearance.

THE COURT: Yes. What about — now I wasn't sure whether what you were saying, Mr. Rogus, is that your client is not going to comply?

MR. ROGUS: What I am saying at this point is now that the Court is ruling on this motion, I have an additional order that I obviously have to discuss with my client before an ultimate decision is made by my client.

THE COURT: Well, I am going to order that she return to the deposition table, and that will be very quickly. How soon would you plan to resume?

MR. FUTTERMAN: We had specified a date that Mr. Rogus informed me that he's going to be out of town next week. And what I would suggest is that he is going to need some time to talk to his client. We are prepared to go forward as soon as Mr. Rogus is able. And we can do it a week following the next any day.

THE COURT: I will make it on or before April 30th. That will give you time after you get back, Mr. Rogus, to have talked to the client. okay.

MR. ROGUS: Very well.

MR. FUTTERMAN: We had a status set for tomorrow, your Honor.

THE COURT: Yes. There is no reason to hold that.

[9] MR. FUTTERMAN: Right.

THE COURT: I will set the matter — I will vacate the April 15th status and reset that for —

MR. FLAXMAN: How about April 30th, Judge?

MR. FUTTERMAN: Because we may know by that time whether the defendant is going to comply.

THE COURT: All right. I will give you April 30th at 8:45.

MR. FUTTERMAN: Thank you.

MR. FLAXMAN: Thank you, your Honor.

MR. ROGUS: Thank you.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
June 23, 1992

[2] THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman Estates. Motion to reconsider and motion to quash.

MS. NYE: Good morning, your Honor. Sandra Nye on behalf of Karen Beyer. Ms. Beyer just stepped out to the ladies, room just a moment ago. I wonder if it would be too much to ask the Court to just hold this for a moment until she returns? I regret it, your Honor.

MR. ROGUS: Good morning, your Honor. Greg Rogus on behalf of the defendants.

MR. FLAXMAN: Kenneth Flaxman for the plaintiffs.

THE COURT: Okay. We will recall it in a minute or two.

(Whereupon the Court directed its attention to other matters on its call, after which the following further proceedings were had herein:)

THE COURT: 91 C 4153, Jaffee vs. Redmond.

I have received this long submission in support of a motion for reconsideration of the denial of motion to quash the subpoena for deposition. it seems to me that the matters that are set out there, which are very thoughtfully set out in terms of what may be characterized as a different regime in terms of the level of professionalism that may attach to clinical social work — although I would hasten to say not as to all of the services that are described in what is characterized as the "Employment Wellness Program," or functions performed by Ms. [3] Beyer — but it seems to me that what we should do in this kind of situation is to focus on the particular nature of the communication that's involved. Yes?

MR. FLAXMAN: You are getting one step ahead. This motion isn't made by Ms. Redmond, it's made by the therapist. Ms. Redmond has been deposed and has answered questions.

THE COURT: Well, I understand that. But the discovery that is sought to be blocked by this is by a third-party witness, as I understand it, who is now being sought to be deposed? Is that not so?

MR. FLAXMAN: That is correct. But before we get to the question, does she have standing to assert the privilege of the witness?

THE COURT: Just a minute. Of which witness?

MR. FLAXMAN: Does she have standing to assert the confidentiality or the claim to confidentiality, the privilege of the client of the defendant?

THE COURT: Well, wait just a minute. What is being sought is, as I understand it, as to communications made by Ms. Redmond, the party, to her — not statements that may have been made by Ms. Redmond in response to an already-taken deposition of her own. Right?

MR. FLAXMAN: Well —

MR. ROGUS: That's correct.

MR. FLAXMAN: I am not sure if it is correct. we want [4] to ask this witness "What did Ms. Redmond tell you?"

THE COURT: Right. Okay.

MR. FLAXMAN: And Ms. Redmond has already answered those questions to the best of her ability.

THE COURT: She has answered — wait. She has answered what she told Ms. Beyer?

MR. FLAXMAN: Yes. She said —

THE COURT: Is that so?

MR. ROGUS: Your Honor, may recall that counsel came in —

THE COURT: I know about that, yes.

MR. ROGUS: On a motion to compel. And your Honor has in fact upheld Ms. Redmond to appear for a third session of her deposition pursuant to your Honor's order.

THE COURT: But wait a minute. My question is, at that point was she asked what she had said to Ms. Beyer?

MR. ROGUS: She was asked a number of questions going to the content of what she had discussed with Ms. Beyer.

THE COURT: Okay. Mr. Flaxman, your position, as I gather it now, is — let me see if I can find out which of two things you are saying. Are you saying that basically any further objection to the same line of inquiry is blocked by the fact that something has already been disclosed about that, or are you saying that Ms. Beyer, who is now sought to be deposed, cannot assert an objection to it, because she is not Ms. [5] Redmond? Which of those things are you saying?

MR. FLAXMAN: The last one — the latter. That the privilege, if there is a privilege, would belong to Ms. Redmond. Ms. Redmond was ordered to answer questions and chose to comply with your Honor's order. And we are now trying to lock the door after the horse has been let out.

MR. ROGUS: It was hardly a choice. There was a court order —

THE COURT: There is a choice, of course, and that is to stand mute and run the risk of contempt and then appeal a contempt —

MR. ROGUS: That is certainly a Hobson's Choice.

THE COURT: No, it's not a Hobson's Choice. That's happened. That's what happened in *Memorial Hospital*, as I remember it. And you know what I did there was to impose — in accordance with the doctrine of *molliter manus imposuit*, I imposed the least laying on of hands for purposes of creating an issue that could then be carried on up. I am frankly reluctant to find just a waiver in that sense. But is Ms. Redmond also asserting the same matters, though that hasn't been set up by a motion?

MR. ROGUS: Well, Ms. Redmond's position is, I think, set forth as fully as I could do it in the motion to quash and in our objection to the motion to compel that we have previously filed.

[10] THE COURT: No, no. Let me try again. Ms. Redmond has not joined in this motion — as it's framed, it's framed as a motion for reconsideration of a denial of the motion to quash the subpoena for deposition. That's a subpoena directed to Ms. Beyer, right?

MR. ROGUS: That's correct.

THE COURT: Now the prior ruling had to do with Ms. Redmond's continuing to testify, which she did. Okay. And then it also related to the taking of the Beyer deposition, right?

MR. FLAXMAN: Right. The first ruling was to quash the subpoena on Ms. Beyer. Your Honor denied that.

THE COURT: Right.

MR. FLAXMAN: Then there was our motion to compel Ms. Redmond to answer, and your Honor granted that.

THE COURT: Okay. Now are you now joining in this motion for reconsideration, because I haven't seen anything?

MR. ROGUS: Well, the motion was just filed in the last couple of days. I have not prepared a separate written submission. But I guess I am here to state to the Court that I would be joining in this motion to reconsider, yes.

THE COURT: Okay. Now there is a motion to reconsider, all right? And the deposition has not yet been taken — the prior

deposition?

MR. FLAXMAN: That's correct.

THE COURT: Then what we have, I suppose, is a motion that says notwithstanding the fact that Ms. Redmond has responded in terms of her version of what it was that she said to Ms. Beyer, we are now — Ms. Redmond is now objecting to the inquiry along the same lines posed to Ms. Beyer, saying that her responses that she gave the last time were done under compulsion of the Court order. And that because they were done under compulsion of Court order, she should not be viewed as somehow having waived the issues so as not to be in a position to assert it now, if I can reframe it, right?

MR. FLAXMAN: I think we should be addressing that procedural issue before we get on to the merits.

THE COURT: I think that's right. Because I think that the question about standing given the assertion of a privilege, is something that does relate to the person in Ms. Redmond's position, or the person in Ms. Beyer's position. Okay. Now shy don't you address that then, Mr. Flaxman?

MR. FLAXMAN: I think it's their burden to show that there is standing — I mean the privilege that —

THE COURT: It's not a standing question. The question is really what I have posed — that is, is there any force to the idea that says, "Look. We were taken kicking and screaming to the alter, and this was not then a waiver because it was not voluntary."

MR. FLAXMAN: I think's it's a waiver because the information has been disclosed.

[8] THE COURT: That's a different question, really.

MR. FLAXMAN: I think — but I think that —

THE COURT: Because if the information is disclosed then you don't need this deposition. You are saying what you would like to have is someone else's version of a response to the same questions, because of the usual reasons that people who take depositions aren't always satisfied with getting the view of one party, for example, to a conversation. Very frequently depositions of both people who were in a meeting are taken because peoples,

recollections differ, and for all of the familiar reasons. So it's not an answer to say, "Well, the questions had been asked and answered because the questions being asked and answered says I don't need the deposition."

MR. FLAXMAN: But what comes to mind there are cases where there is an attorney-client privilege and the client has testified about it and the lawyer says, "I am not going to testify, it's attorney-client."

THE COURT: That's a waiver. That's a waiver. And that's — you are getting back to the point that I made, which is a waiver is of course the voluntary surrender of a known right.

MR. FLAXMAN: I thought that knowing and intentional rather than voluntary —

MR. ROGUS: Voluntary, I think, is a necessary element and recognized by countless cases that have addressed this [9] situation of whether a waiver is —

THE COURT: I am reluctant under the circumstances to dispatch this one on what may be labeled as the technical ground of waiver, given the fact that the testimony was not — was given under compulsion of a Court order. Now I recognize that there was an alternative to that, and that was the one that I identified up front. I am not sure that failing to pursue that alternative necessarily converts the thing into the equivalent of a voluntary statement.

MR. FLAXMAN: I think it does. I think perhaps you should be getting written submissions from us. Because I think what you are really being asked to recognize here is a privilege not for the patient or the client, but for the therapist, which is in the Illinois statute that the therapist has the right not to disclose information if she feels it would harm the patient, even if the patient was deposed. I don't think that we are anywhere near that under the Federal Rules of Evidence.

THE COURT: That is right.

MS. NYE: If I may, your Honor —

THE COURT: No, I don't share that view.

Let me, if I may, turn to the substance of the matter. We have in the context in which privileges are well-recognized — the lawyer-client context, the confessional — blocked from exposure matters that bear for example on the commission of a crime. What has been done is to [10] sacrifice the basic notion that lawsuits are a search for truth to the recognition of the principles that underpin that kind of privilege.

By the way, you know we talk about lawsuits as being asserted for truth, and one of the seldom looked at provisions of Federal Rules of Evidence says that. That's you know Federal Rule of Evidence 102, one of those that rarely gets referred to because it doesn't have a precise impact on specific rulings. It talks about construing the rules "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Now that's I think both a powerful and a dominant aspect of what litigation is about in our system. And it is for that reason that we have provided narrow exceptions to the situation, the kinds of well-recognized and long-established and traditional privileges of the sort that I've referred to.

My sense is that despite what has been said thoughtfully here in support of this motion for reconsideration, that narrowly-based inquiry simply into what the disclosures were about — the version of events as given by Ms. Redmond to Ms. Beyer should be permitted. I an not talking about any of the other aspects of whatever dialogue may have taken place, whatever other consultation may have taken place, the [11] professional opinions that may have been rendered — determinations that may have been made about the treatment, therapy, anything else. None of those seem to me to be matters that, as far as would be sought in the nature of inquiry, ought to override the kinds of considerations that are identified in the motion for reconsideration. But the narrow inquiry, which is a matter of ascertaining events that are in sharp dispute as to how they evolved in the situation that leads to this lawsuit, are matters that I believe ought to be capable of inquiry of Ms. Beyer.

And my ruling on that then is that Ms. Beyer may be deposed, but deposed only with respect to the disclosures made to her by Ms. Redmond of the incidents of the day that relate to the matter that is at issue in this lawsuit.

MR. FLAXMAN: The problem that we have with that is that one of the questions that will be at issue before the jury is Ms. Redmond's ability to recall, whether her memory has changed, where she doesn't actually recall the events that happened that day. Other things that she might have told Ms. Beyer would be relevant to her memory and her ability to recall.

THE COURT: No, no, no. That's very attenuated. And you will be able to inquire about that in any number of different ways. But the idea of somehow testing memory by inquiring into other areas of discussion that the may have had and whether her current version may differ or may not differ [12] from that are really tangential. As far as I am concerned the, focal point here, given the very sharp dispute about what the events actually were, may fairly entitle you to inquire into what she said to Ms. Beyer on that score, notwithstanding the fact — and I recognize that the thrust of this argument is in part that the purpose of making that disclosure was for purposes of getting the assistance of someone who is characterized by state law as a professional in a way that I have found, and I continue to find, Federal Rule of Evidence 501 does not fairly call for an extension to cover. So that's the nature of my ruling.

I don't know whether to characterize it as a granting or denial of the motion for reconsideration. I did not, as you will recall, quash the subpoena. But what I am doing is defining the appropriate scope of inquiry in pursuit of that subpoena. And that's going to be a limited area of inquiry. Is there anything that's unclear about the scope?

MR. ROGUS: I think it's clear. You are just talking about questions about the events that she saw or that she partook in on the day of the incident?

THE COURT: That's right. What she saw and what she did on the day of the incident. And that's as relayed to Ms. Beyer.

MR. FLAXMAN: You know — I don't want to argue with you, although —

[13] THE COURT: You can do it any time. That's what you are supposed to do.

MR. FLAXMAN: I don't want to lose an argument, which is what often happens.

THE COURT: That's what you have already done.

MR. FLAXMAN: I think your Honor's ruling is too narrow, and I am not sure if my standing here can get you to understand why it's too narrow. We want to know why it is that Ms. Redmond has been in therapy so many times in such a long period of time. We want to know if Ms. Beyer has any opinion as to whether the weight loss that Ms. Redmond has had after the incident is related to Ms. Redmond feeling guilty about it, or not accurately reflecting the incident. We want to know if Ms. Redmond has complained about dreams that she has had — painful recurring nightmares that she has had — which could recall her recollection. There are a whole host of questions that we want to ask that would have been discussed in the course of therapy which really go to this woman's — the defendant's — ability to recall, to accurately recall what she saw.

MR. ROGUS: We have already addressed at some length in our past appearances before your Honor and in our written submissions the whole question of the total lack of relevance of these points that Mr. Flaxman is raising right now. And I think your Honor has already addressed them.

THE COURT: Well, I haven't been persuaded this [14] morning, if that's your question. I don't find, Mr. Flaxman, those things that I've characterized for better or worse as really tangential. It does not seem to me that you are entitled to go into the kinds of areas that you have talked about when that has been for purposes of this sort of professional consultation that we are talking about here. And this is really — in part that draws on issues of relevance, and in part it draws on the kind of reference that's made here to the quality of the person that's involved as the consultant.

MR. FLAXMAN: What I would like to obtain from your Honor, given your Honor's lack of — frequent lack of taking motions to reconsider, what I contemplate doing is coming back after we have deposed Ms. Beyer with her deposition and Ms. Redmond's deposition and affidavit from our expert to try to help you understand why it is that these inquiries that we want to undertake would be relevant. And what I would like to you to say is that "Mr. Flaxman, if you want to do that you can, and I will take a look at it."

THE COURT: Mr. Flaxman, if you want to do that you can.

MR. FLAXMAN: Thank you.

THE COURT: And I will take a look at it.

MR. FLAXMAN: Thank you, Judge.

MR. ROGUS: And I will address it at that point. Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPTS OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
December 10. 1992

* * *

[41]

THE COURT: Okay. Well, I suppose I can reasonably pick up on where you left off. That's a distinction that I think in candor, Mr. Rogus, is meaningless. That is, I see no [42] distinction — no rational distinction — between the issue of judicial or any other factfinder determination of credibility for this purpose and determinations of credibility for any other purpose.

What we have, as I see this, is a situation in which unlike the one in which witnesses frequently indulge themselves in response to questions by testifying not in terms of pure recollection, whatever that term may be, and testifying in terms of what they believe must have happened, because common sense tells them that's what must have occurred, we have a situation in which Ms. Redmond is applying what she would characterize as kind of a purist position. That is, if I do not expressly recall something in its unvarnished form, the proper response for me is "I don't recall."

Although I may or may not have mentioned to you the lasttime, by chance I had the experience myself within the past couple of

months of testifying in a state court lawsuit about a transaction in which I was the lawyer that went back to a period between 1967 and 1969. And I was asked, as you might guess, detailed questions on that subject. I sought to be as meticulous as I could be in terms of making exactly the kind of distinction that I have just referred to, that is, not wanting to testify about something, because I thought "Yes, it must have occurred in that way," but limiting myself to things that I truly recalled. With the assistance of the kind of things that [43] were available to me, I was indeed able to muster direct recollection rather than "it must have been recollection," and I testified to the best of my ability in that respect.

Mr. Rogus, you've correctly referred to the fact that memory is kind of an odd subject. There has been a lot that has been written about that. Mostly by the way, in the context of the "eyewitness" kind of thing, because there has been a lot of analysis of that type of matter in terms of credibility.

But I do not find that what has been said by Ms. Redmond today is entirely believable. I really do not find it believable that she would have such a nearly total absence of recollection about discussions about an enormously important event in her life, unless the mindset that she was approaching the questions with, was one that adopted an extraordinarily blinded approach.

Now I am reluctant to characterize that as the kind of willfulness that calls for a dramatic sanction — ultimate or nearly ultimate sanction — of the type that's been asked for on behalf of the plaintiff. The notion of foreclosing Ms. Redmond's opportunity, for example, to testify in connection with this trial, is a notion that I think is inappropriate. But it also seems to me that the notion that the plaintiff should be foreclosed from an opportunity to determine whether other statements that Ms. Redmond has made in the course of depositions, and therefore a kind of prediction of what she is [44] likely to testify to when the case comes to trial, may or may not be at odds with statements that she has made on other occasions. The notion that the plaintiff should be precluded from learning that is one that I would find equally unacceptable.

Now one obvious potential source of such other statement is Ms. Beyer, the person with whom, despite Ms. Redmond's lack of expressed recollection that she has told us about today, or lack of

general recollection, whatever that word means — the question that you were asking that I sustained an objection to — it really passes belief that at least some of the areas that were inquired about by Mr. Futterman today were not indeed the subject of discussions as between Ms. Redmond and Ms. Beyer.

Accordingly my sense of the appropriate sanction, if you want to call it that, is to give the plaintiff access. If it cannot be derived from Ms. Redmond, if it cannot be revived from one end of that conversation — set of conversations — then they are entitled to have access from the other side — the other the party to those same conversations. And that means that as far as I am concerned the bars are pretty well down to the opportunity to have access to Ms. Beyer in terms of what she recalls of those conversations.

Now I don't know what — you know, all I have seen have been a couple of reports that have been edited here — and [45] I don't know what if anything has come out of that. Maybe counsel can fill me in about that? What has been the result of the efforts at discovery from Ms. Beyer?

MR. FLAXMAN: Well, we received that two pages which we filed with this motion.

THE COURT: Those pieces of paper?

MR. FLAXMAN: Those pieces of paper. And we have deferred redeposing her in the expectation that we might have an opportunity to expand those — rather than having her three depositions, it would be two. So what you see is what has been honored —

MR. ROGUS: She has been deposed. Your Honor may recall we fought over the issue of just what could be gone into at her deposition. I believe — you know, we had Sandra Nye here. We went through the additional submission that Ms. Nye submitted on behalf of the therapist as well as the submissions we did. And you ruled —

THE COURT: But what substantively has come out of that discovery?

MR. FLAXMAN: Oh, substantively that Ms. Beyer recalls conversations with Ms. Redmond about the incident.

THE COURT: And anything substantive about the specifics of those conversations?

MR. ROGUS: I believe there was some testimony by Ms. Beyer regarding her recollection of certain specific matters [46] dealing with the facts and circumstances of the incident that Ms. Redmond did discuss with her.

MR. FLAXMAN: There was a problem at her deposition when Ms. Beyer at times would say, "I am not sure whether I learned this from Ms. Redmond or from somebody else." And then there was — we were not provided with an opportunity to ask her who else she talked to or what else she knew about the case, which was the matter we presented to your Honor in the motion to compel.

THE COURT: Yes.

MR. ROGUS: But as far as the substance of facts and circumstances of the incident that's been covered with Ms. Beyer already at deposition.

THE COURT: With the same degree of specificity as the whole series of questions that Mr. Futterman posed to Ms. Redmond today?

MR. ROGUS: I don't know if each and every question was put to her, but I know there was a fairly detailed questioning of Ms. Beyer. But I am not going to represent to the Court that it was the exact same thing questions.

THE COURT: Right. Mr. Futterman?

MR. FUTTERMAN: Your Honor, I didn't take that deposition, but Mr. Flaxman did. But I looked at the transcript before the hearing today in preparation for it, and those kinds [47] of questions — the details of those questions — was not asked. It was much more general in nature. She was able to provide some specific that she remembered. She went through specific things that she remembered Ms. Redmond talking about. We did not go through the litany of questions we went through this morning.

THE COURT: Well, at a minimum it seems to me that if we have someone who states the total absence of recall, or near total absence of recall, as Ms. Redmond has, about a whole series of

subjects that practical judgment would tell us must necessarily have been the occasion for discussion between someone in Ms. Beyer's situations, given the circumstances under which she was called into the matter, and some one in Ms. Redmond's situation, then at a minimum one appropriate source of relief would be to enable the same kinds of precise questions — and in detail — to be posed to Ms. Beyer.

I don't want to speculate about — you know, I don't mean to play "Jacobowsky and the Colonel" — and that is, if this then that, and if the other thing, then this. That's where the classic line, then there are two alternatives, you know, comes from at each branch, until we ramify ad nauseam.

So that it appears to me that at a minimum the kind of alternative that I referred to I think the last time when we set this hearing — and that is, an unfettered type of examination of Karen Beyer — would be an appropriate course of action. [48] Because my determination — and I want to make this plain — is that I view Ms. Redmond's characterizations of lack of recollection as reflective of a desire not to recall. That is, not making an effort to engage in the process that I just described in talking about my own experience as a witness.

You know when someone is going to have an inquiry posed about something as recent as we have here, and as recent as May of '92 was, in relation to a traumatic incident of less than a year earlier, then it seems to me that the kinds of responses to be most charitable to Ms. Redmond that she gave are simply reflective of wanting to answer, if at all possible, "I can't recall," rather than making the kind of searching self-examination that I think was incumbent on her in connection with each of these things, and then generating the appropriate response to that.

So my sense is that the last thing that I would ever want to entertain would be the kind of ultimate sanction that the courts have sometimes met willful flouting of judicial orders with. It does not seem to me that this is a situation that calls for that result. But I think at a minimum what counsel are entitled to do is to go back and to inquire of Ms. Beyer in the same kind of detail — and whatever other details they may want to inquire about that's relevant to this litigation — and see what that produces.

If the answer to that one — well, no I am not going [49] to deal with it. I said I wasn't. And I won't.

MR. ROGUS: Your Honor, If I may.

THE COURT: Yes.

MR. ROGUS: I am sorry.

THE COURT: Well, that's least really it. I had told you last time when I made my oral ruling I had already indicated to you that this has an important relevance other than the general question of witness credibility that's always present. And that important relevance has to do with the fact that any statements that Ms. Redmond made during the course of her discussions with Ms. Beyer that bear upon the incident that's in litigation here constitutes nonhearsay matters that would themselves be admissible in evidence. And therefore it's all the more important that counsel have access to those.

MR. ROGUS: We seem to have a continuing difference of opinion over the scope of your rulings. From time to time I know we have argued on the record, off the record, you have used, your Honor, a couple of terms that I want to make sure that I have got the correct bearing on your definitional sense, because you used the word "unfettered" a short while ago. You have also said —

THE COURT: Unfettered. I use that not in terms of subjects that are unrelated to what's in this litigation. I mean unfettered in terms of anything that bears the same kind of relationship to the litigation that generally is set by Rule [50] 26(b)(1)) — and that is, information reasonably calculated to lead to the discovery of admissible evidence. I am not about to set a new standard for that, it's set by the Rules.

MR. FLAXMAN: I don't want to play "What will happen," but I know what will happen. I will ask Ms. Beyer, "What did Ms. Redmond tell you when you first met?" And Sandra Nye I will say, "That's not relevant to this case."

THE COURT: Well, of course it's going to be relevant. "What did she tell you" — you know, if that question is appropriately — when you say, "What did she tell you," you have to anchor it to matters that relate to our incident here, don't you?

MR. FLAXMAN: Well, I think not, Judge. Because we have a witness who has had 300 or 100 conversations with Karen Beyer, who said, "I can't recall if we discussed any of a 100 different things." I think we are entitled to know: can she recall anything else that was discussed with Karen Beyer. Why could she remember one thing and not another? Why could she remember, for example, why she talked about her dog being sick, but she can't remember shooting a man? Why can she remember that her shoelaces broke, but she can't remember that she saw a man with a knife.

THE COURT: I would permit that kind of inquiry in terms of subjects rather than particular conversations. That is, if she recalls other subjects that they discussed — subject [51] matter — then that may well bear on the question of credibility in terms of what may or may not be a stonewalling on this issue.

You know, I can't anticipate that, because I am not going to sit in on this deposition.

MR. FLAXMAN: I wasn't going to invite your Honor. But I think if we are having a deposition and it's going to be "counsel's eyes only," I think it would be just more efficient to have a deposition, "What did you say, what did she say to you," and —

MR. ROGUS: That approach is just too open-ended. I thought we have already addressed this subject ad nauseam back in the spring time, and your Honor had drawn the parameters. And now counsel is seeking basically for you to redefine the parameters.

THE COURT: Again I am disinclined to — you know, I don't know how this counselor goes about her business. I don't know whether she asked about somebody's sex life, or whether she asked about somebody's childhood, or whether she asked about those things, by I am certainly not going to give you open season on particulars of that kind of discussion, if they took place. I am just not going to do that. I will permit you to inquire about subject matter. Again if the counselor says, "Oh, yes. We talked about Ms. Redmond's childhood," or "We talked about her sex life," or whatever, I will permit you to inquire about subject matter, because if then we have a witness who [52] says, "Oh, I remember talking about that subject, but I don't remember talking about anything

having to do with this subject," that would strain credulity. So that much I will permit you to do, but not again in terms of —

MR. ROGUS: The followup questions.

THE COURT: That's right.

MR. FLAXMAN: Well, but what we are doing is to depart from the general rule that objections at depositions about relevancy should be noted for the record and not ground to instruct the witness not to answer.

THE COURT: But that general ruling even in Eggleston against Plumbers, which voiced it in an opinion of —

MR. FLAXMAN: Judge Wood.

THE COURT: Even that, remember, is subject to the exception that things that come within privilege, for example, are not to be applied there. Things that on their face are not relevant, counsel has a responsibility not to pose questions in those terms. I am now telling you what ways you can deal with that, so you are given advance notice, which you seldom get. All right? And therefore you know the manner in which you can conduct this one. And therefore I would expect we are not going to have the occasion, I trust, for that kind of objection. But subject matter you are certainly entitled to inquire into for exactly the reasons that I have disclosed.

MR. FLAXMAN: I assume that we are also entitled to [53] get whatever note she has which relates to the subject matter?

THE COURT: Sure.

MR. ROGUS: Now there, your Honor —

THE COURT: On this subject matter?

MR. ROGUS: No. He's talking about other subject matters. He's talking about particulars on other subject matters.

THE COURT: Oh, he hasn't asked about other subject matters?

MR. FUTTEPMAN: Well, the notes reflect that there was a conversation about dogs without going into the — I mean it could be redacted, but I think consistent with your Honor's ruling we

should be able to get notes.

MR. ROGUS: What am I going to do, your Honor? Redact the language? I'll leave the word "dogs" on there and they are not going to be satisfied with that, and we are going to be right back in here.

THE COURT: I cannot — you know, there is a limit in terms of my speculating about what's going to come out in that sense. I have no knowledge of how that counselor conducts her activities, conducts her business, maintains her records, and therefore I am not going to extend it to that.

MR. ROGUS: Thank you, your Honor.

THE COURT: Okay.

MR. FUTTERMAN: Thank you, your Honor.

MR. FLAXMAN: Can we have another status to come back and keep on track?

THE COURT: Yes. What are we talking about from now? How much time?

MR. FLAXMAN. 3 or 4 weeks.

MR. ROGUS: Closer to 4, if you don't mind, because of the holidays.

THE COURT: Okay. I will give you January 7th, '93 at 8:45. That's 4 weeks.

MR. ROGUS: Thank you, your Honor.

MR. FUTTERMAN: Thank you, Your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE MILTON I. SHADUR, Judge
April 6, 1993

THE CLERK: 91 C 4153, Carrie Jaffee vs. Hoffman [2] Estates, status.

MR. WILENS: Good morning, your Honor. Robert Wilens, W-i-l-e-n-s. Mr. Rogus is currently at the tail end of a wrongful death claim. He apologizes for not being here.

MR. FUTTERMAN: Good morning, your Honor. Ronald Futterman, Ken Flaxman and Jennifer Soule for the plaintiffs.

THE COURT: We don't have counsel here, I know, for Ms. Beyer. I would have expected that counsel would be here.

MR. FLAXMAN: I made a mistake yesterday about the time, and he might be making a mistake about the time.

THE COURT: Well, I am going to rule orally. This thing has been pending, and counsel can become apprised of what I am dealing with here.

What this record reflects is a constant shifting of positions by the parties that are responding here — whatever seems to be

necessary to prevent plaintiffs, counsel from getting access to the records that are at issue. At one point the answer that was given to me was simply in terms of requiring an order from me. Then when that seemed to be easy of accomplishment, the answer shifted to the claimed need for Ms. Redmond to sign a particular form of release. Then it has become neither of those. Now Ms. Beyer isn't sure that anything will suffice to do the job.

Similarly, during her deposition Ms. Beyer [3] acknowledged that the documents are the property of her employer, the defendant here, the Village of Hoffman Estates. Now what is asserted on her behalf is that the notes are her property. Although I don't mean to digress on this issue because it's not going to control what I do here, an issue that is not dealt with is what happens even under the law that's cited for that proposition when the person, as in this case, is an employee.

So far as Ms. Redmond is concerned, what I heard during her original deposition was a wholly noncredible claim of a total failure to recall, really a stubborn and a patent kind of stonewalling. Then at the March 8th hearing Ms. Redmond responded to a direct question from me by stating that she would disobey any court order that she authorize Ms. Beyer to produce any notes.

What all of this leaves me with is the firm conclusion that there has been and continues to be a willful flouting of the Court's orders and authority, both by defendant Mary Lu Redmond and by Karen Beyer, who is the employee and the agent of the other defendant, the Village of Hoffman Estates. And I regret to say that has continued despite the fact that I have been more than patient, I believe, in giving each of them the opportunity for compliance.

What's clearly been reflected at the last evidentiary hearing is that each of them views herself as above the law, [4] preferring to follow her own counsel (and I use that in a nontechnical sense — I don't mean lawyer counsel, I mean her own self-asserted counsel) rather than to obey court orders or to challenge them in a legitimate way rather than by defiance. And what is important as well is that when I refer to each of them, that of course applies with equal force to Hoffman Estates, which has done nothing whatever to deal with matters within its own control, but has basically left it to this employee — this recalcitrant employee — Karen Beyer.

Now at this point the string has run out. Both defendants, Ms. Redmond and Hoffman Estates through its agent Karen Beyer, have frustrated the opportunity of the plaintiffs to engage in the discovery that is-plainly necessary to learn the potential impeachment of Ms. Redmond's version of the events. And again I say that Hoffman Estates has offered nothing constructive throughout this entire proceeding. Each of them — all three of them — refuse to budge or to comply despite the proposals that the Court has held out to minimize or to eliminate entirely any arguable infringement of privacy rights or possibly any applicable privileges.

Now that leads to the question of what solution should be applicable in the face of this kind of intransigence. Because that conduct has continued in the face of every opportunity for compliance, the recommendations on plaintiffs, behalf for a strong and appropriate response hold [5] persuasiveness.

What I will not do, however, is to order a default or a judgment in the plaintiffs' favor. Defendants' reply memorandum correctly points out that surely I am not in a position to deal with a whole host of factual questions. But it's equally true that the combined positions of these defendants have prevented the effective opportunity to cross-examine Ms. Redmond in important and critical aspects. Accordingly — let me back up before I deal with that. You know, I have referred to the cross effect of these respective' positions. in that regard I do not accept the suggestion by Ms. Redmond and Hoffman Estates that somehow it's really not a matter of their choice, as though they are somehow helpless in this situation. As I have said, at one point in Ms. Beyer's testimony she pointed to the lack of release from Ms. Redmond before she retreated to a fuzzy position, and then to the ultimate total refusal. Clearly if each of the parties had approached the matter constructively rather than in this obdurate fashion, this problem would long since have been readily capable of elimination.

Now having said that, I return to the question of remedy. And here it is. First, defendant Redmond will be precluded at trial from testifying as to her version of the event in which she shot Ricky Allen, because she and defendant Hoffman Estates have blocked the plaintiffs from effective cross-examination on that subject.

Second, Ms. Beyer, as a nonparty, has disobeyed court orders, and that matter will be referred to the United States Attorney for consideration of possible prosecution as criminal contempt under Federal Rule of Criminal Procedure 42(b). My sense of the matter is that that's a matter that should not — that should be assigned to some other District Judge. And that will be a matter, if the proceedings are pursued, that will be left to the Executive Committee for determination.

This thing has been sidetracked by these issues more than long enough. Where are we in terms now of getting ourselves to the posture of readying the case for trial? Let me here from plaintiffs-' counsel.

MR. FLAXMAN: I think we are at the point of setting dates for filing the pretrial order and setting for trial.

MR WILENS: To date plaintiffs have not disclosed an expert. I think that's still the case. So I don't think there is going to be any expert discovery then. If I am wrong, you can correct me. MR. FUTTERMAN: That's right. We are ready to set a date for the pretrial order.

THE COURT: All right. I will set then the final pretrial order, which can omit, as I ordinarily do in Section 1983 cases, any trial briefs, jury instructions and voir dire questions at this point. Those will be deferred until later on.

And therefore the final pretrial order should be capable of being filed by May 10th. The pretrial conference will be May 18th at 4:30. Thank you.

MR. WILENS: Your Honor, if I may ask one question.

THE COURT: Sure. BR. WILENS: By your ruling I wasn't quite clear. What is the conduct of Karen Beyer that you have specifically held that has violated this Court's order — I am sorry. Mary Lu Redmond that's violated this Court's order?

THE COURT: It's been her refusal to — it's been a combination of two things: One, the less-than-credible responses to the inquiries about her recollection of the information that she had provided to Karen Beyer — the thing that basically triggered this proceeding. But also and importantly, her combined failure and

refusal to take any action from the outset that would lead to the provision of these materials by way of discovery. This is not much different from the classic jury instruction on proximate cause, in which a matter need not be the proximate cause, but it is sufficient for it to be a proximate cause where the conduct of more than one person in concert effectively creates the harms. And that's the situation that has existed here. Each one has been essentially pointing the finger at other when they finally get around to stating some kind of position and saying, "Well, it's not my doing," you know, "Look at her,,, And that's not not my doing," you know, "Look at her." And that's not persuasive in either situation.

MR. FLAXMAN: Thank you, your Honor.

MR. WILENS: Thank you, your Honor.

(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

MEMORANDUM

During the April 6, 1993 status hearing that this Court had scheduled for that purpose, it ruled on the motions by plaintiffs for the imposition of sanctions against the parties to this action and against witness Karen Beyer ("Beyer," an employee of defendant Village of Hoffman Estates). Plaintiffs' motion was based on the obstructionist tactics that the three respondents had pursued tactics that had blocked the legitimate efforts of plaintiffs' counsel to obtain relevant discovery as to what defendant Marylu Redmond ("Redmond") had told Beyer about matters that could potentially lead to the impeachment of Redmond's version of the events that form the gravamen of this action.

At the conclusion of the hearing, counsel who was appearing for Hoffman Estates and Redmond inquired as to the basis for this Court's finding of wrongdoing on Redmond's part, and this Court summarized those matters in terms of both Redmond's wholly non-credible responses during her own testimony — reflecting her purported failure to recall any information that she had provided to Beyer — and her other stonewalling tactics that had frustrated plaintiffs' efforts to obtain the discovery to which they were entitled.

This Court has now been provided with a copy of the transcript of the April 6 hearing, and one clarifying supplement is in order.

Although this Court's description of Redmond's conduct was accurate, the manner in which defendants' counsel had phrased the question was not.[1] Counsel's inquiry was framed solely in terms of Redmond's violations of an order of this Court. That of course was the only nature of Beyer's offense, for she had flouted this Court's order to answer questions in her deposition. As for Redmond, the conduct that this Court described in response to counsel's question involves her noncompliance with her discovery obligations under Fed. R. Civ. P. 37, conduct by Redmond that has interacted with Beyer's actions to thwart plaintiffs' legitimate efforts to obtain needed discovery.

Dated: April 8, 1993

/s/ Milton I. Shadur
Senior United States District Judge

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1. This should not necessarily be read as criticism of counsel, who was not familiar with the case — he was pinch-hitting for the regular counsel who has acted for defendants throughout the case, but who was actively engaged in a trial elsewhere at the time of the hearing.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CARRIE JAFFEE, as Special Administrator for Ricky Allen, Sr. and LECHIA ALLEN, Next Friend of RICKY ALLEN, JR. and BRANDON ALLEN

Plaintiffs,

No. 91 C 4153 *v.*

MARYLU REDMOND, Hoffman Estates Police Officer and VILLAGE OF HOFFMAN ESTATES, ILLINOIS,

Defendants.

EXCERPT OF CHARGE TO JURY

***

[746]

THE COURT: In this case you've heard evidence that Karen Beyer, while an employee of the Village of Hoffman Estates had numerous conversations with Mary Lu Redmond and made notes of those conversations. And you have also heard testimony that Ms. Beyer's notes were the property of the Village of Hoffman Estates. During the course of the lawsuit, this court ordered the Village of Hoffman Estates to turn over all of Ms. Buyer's notes to plaintiffs' attorneys. The Village was provided with numerous opportunities to obey the court order. And it refused to do that.

During the course of this lawsuit Mary Lu Redmond also testified that she would not authorize or direct Ms. Beyer to turn over those notes to plaintiffs' attorneys.

During Ms. Beyer's testimony she referred to herself as a therapist, although she is not a psychiatrist, not a psychologist. She's a social worker.

This Court has ruled that there isn't any legal justification in this lawsuit, based as it is on the federal constitutional claim, to refuse to produce Ms. Beyer's notes of her conversations with Mary Lu Redmond. And that such refusal was unjustified. Under

the circumstances, you are entitled to presume that the contents of those notes would be unfavorable to Mary Lu Redmond and to the Village of Hoffman Estates.